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REPORTS OF CASES

DETERMINED IN THE

PRACTICE COURT AND CHAMBERS

WITH

POINTS OF PLEADING AND PRACTICE

DETERMINED IN THE COURTS OF

QUEEN'S BENCH AND COMMON PLEAS

By CHRISTOPHER ROBINSON, Q.C.

VOL. III.

THIRD EDITION—(REPRINT)

TORONTO :
THE CARSWELL COMPANY, LIMITED
30 ADELAIDE STREET EAST

1904

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McGEE v. BAIRD AND CUNNINGHAM.

Judgment—Consol. Stats. U. C., ch. 26, sec. 17.

A judgment obtained contrary to the Consol. Stats. U. C., ch. 26, sec. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment.

[QUEEN'S BENCH, M. T., 1860.]

Helliwell obtained a rule on the plaintiff to shew cause why the judgment in this cause, and the confession on which it was founded, should not be set aside with costs; or why the execution, with all proceedings upon it, should not be set aside with costs; or why the execution should not be postponed, as to the satisfaction thereof, by the sheriff of the county of Carleton, till after the other executions had been satisfied, which had issued against the goods of the same defendants, at the respective suits of Andrew Watrous, and of Thomas Hunter, and William Hunter: on the ground that the said confession (in this suit) was void as against creditors of the defendants, under the Consolidated Statutes of Upper Canada, ch. 26, sec. 17. He cited *Armour v. Caruthers*, 2 P. R. 217; *Brent v. Perry*, 5 U. C. R. 538.

C. S. Patterson shewed cause, and cited *Young v. Christie*, 7 Grant Chy. Rep. 312; *McMaster v. Clare*, Ib. 550; *Loader v. Hiscock*, 1 F. & F. 132.

The court held that the affidavits shewed the case to be within the statute both in regard to the defendants being insolvent at the time they gave the confession of judgment to McGee, and to the purpose and intent with which they gave it; and that it was competent to the other judgment creditors of the defendants to move in this case to set the judgment and other proceedings aside; and they directed the rule to issue according to the second alternative, for postponing merely and not setting it totally aside, thus leaving the execution still in force as between the parties to that suit.

ASHTON v. McMILLAN.

Replevin—Costs—Certificate.

A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts.

[QUEEN'S BENCH, H. T., 1861.]

The plaintiff replevied a quantity of timber, which he claimed to be his, and which was in defendant's possession. He swore that it was worth £52 10s. in the affidavit made when he took out the writ. In the declaration he complained of a wrongful taking as well as detention. It was not upon any distress that had been made. The action was brought to determine the right to the property.

The plaintiff obtained a verdict, which, as usual, was for 20s.

No certificate for costs was obtained or moved for at the trial. Judgment was entered in the country, and the deputy clerk of the crown who taxed the costs taxed Queen's Bench costs. On application to the master he confirmed the taxation.

The learned Chief Justice of this court was applied to in chambers for an order to revise taxation, and referred the parties, as it was a question of practice often arising, to the full court.

A rule was accordingly obtained by Eccles, Q.C., against which Hector Cameron shewed cause in the first instance.

For the plaintiff, it was contended that the verdict being for 20s. signified nothing, since that was well known to be a mere nominal verdict, having no reference to the value of the goods in litigation, and that the affidavit of value and the replevin bond should govern, which in this case shewed that the case could only be brought in one of the superior courts.

For the defendant, it was argued that the plaintiff could not be allowed by his own affidavit to fix the value of the goods in dispute, and that the bond merely conformed to the affidavit: that at the trial it often turned out that the plaintiff limited his claim to part of the property replevied, or gave no evidence of right to a large portion of the goods, and in such cases it would have appeared to the judge that

there was no pretence for suing in a higher court: that the judge at the trial had almost invariably the means of forming a judgment of the real value that was in contest, and that the plaintiff could always shew it if he pleased, so that the judge could as well certify in these cases as in others; and by that means only could it be known to the master whether full costs should be allowed or not.

ROBINSON, C.J., delivered the judgment of the court.

In point of practice there is no doubt that in replevin certificates for costs are often applied for at the trial and granted.

In this case it is stated that the timber replevied was not worth more than £35.

As there was a trial in this case, the rule of court is not available to the plaintiff, which provides for the judge receiving an application for full costs on affidavit in all cases where judgment has been obtained without a trial.

We have spoken with the judges of the other court on this point of practice, and we are of opinion that full costs should not be taxed without a certificate in cases of replevin more than in other cases where, for all that the verdict or the determination shews, the action might as well have been brought in the lower court as in the higher.

We therefore make the order for revising taxation, with a view to confine the costs to those of the county court.

Rule absolute.

CARRALL, SHERIFF OF THE COUNTY OF OXFORD, v. POTTER.

Money paid into court—Fees.

No percentage can be claimed upon money paid into court except under a plea.

Where money was paid in under a judge's order, to abide the result of another suit, held, that the only charge allowable to the clerk was 20s., under the tariff of costs.

[QUEEN'S BENCH, T. T., 1860.]

R. A. Harrison obtained a rule nisi on the clerk of this court, to shew cause why he should not refund to the defendant £7 15s., the amount of percentage paid to him on paying

money into court under an order made by the Chief Justice of this court in this cause, or so much thereof as the court might think fit; and why he should not pay the costs of this application; on the ground that the statute only applies to payment of money into court under a plea; on the ground that the tariff of costs established by the courts covers all that should be charged, either under the statute or otherwise.

On the 26th of April, 1860, the Chief Justice of this court made an order in chambers that upon payment by defendant into court within ten days of the amount of the judgment debt and costs in this action, execution should be stayed till the determination of a cause in which the defendant was plaintiff and the now plaintiff was defendant, then pending in error and appeal, the amount so to be paid into court to abide the event of the last mentioned cause, and to be then dealt with as should be directed by this court.

Under that order the defendant's attorney paid into court \$3,068.68.

The clerk of the court charged one per cent. on the amount as under the statute, and £1 under the table of costs, in all £8 15s., considering that he was bound to exact that on account of the fee fund, and he refused to receive the money without.

The defendant's attorney questioned his right to charge more than the £1, but paid it under protest, and now reclaimed it, having given notice to the clerk at the time that he would do so.

Hodgins shewed cause, and cited 2 Geo. IV., ch. 2, secs. 25, 26, Consol. Stats. U. C., ch. 22, secs. 99, 100; Consol. Stats. U. C., ch. 10, sec. 29; *In re Willman*, 4 Dea. & Ch. 810; *Ex parte Allen*, 2 McN. & G. 360; *Bloor v. Huston*, 1 Jur. N. S. 256.

ROBINSON, C.J., delivered the judgment of the court.

No fee can be exacted for anything done in the course of administering justice which is not expressly given by law. We see no allowance made of a percentage on money paid

into court by any existing law, except under the 99th and 100th sections of the Common Law Procedure Act, Consol. Stats. U. C., ch. 22, and that only relates to money paid into court in a cause by way of amends, or as so much acknowledged to be due, which is not exactly this case, and claimed, and that can be claimed because this allowance is so that provision does not apply; and besides this, there is our tariff of costs, which allows 20s. on all sums paid into court not under £100. This we think is all that can be not restricted to money paid in upon a plea.

McCLENAGHAN V. McLEOD.

Judgment of non pros.—Penal action.

A judgment of non pros. regularly signed in an action by a common informer for a penalty will not be set aside.

[QUEEN'S BENCH, T. T., 1860.]

Adam Crooks obtained a rule on the defendant to shew cause why the judgment of non pros. signed for want of a replication should not be set aside, and all subsequent proceedings, on the ground that the plaintiff had a good cause of action, on such terms as the court might think fit.

The plaintiff's attorney swore that the plaintiff had a good cause of action, as he was instructed and believed. This application was made in the Practice Court, and referred to the full court. It was admitted on the plaintiff's part that the judgment was regularly signed, and not by any sharp practice in the defendant; and he asked only to be allowed to proceed in his action on the footing of indulgence, and on the terms of paying costs, if the court should think it right to insist upon it.

The defendant resisted his application only on the ground that the plaintiff was suing for a penalty as a common informer, and that it was against the general practice to facilitate his proceedings by such an indulgence.

The action was brought on the statute 20 Vic. ch. 22, sec. 5, for a penalty for sitting in the Legislative Assembly, being a person disqualified from sitting or voting by reason of his alleged interest in a contract with the government.

Prince shewed cause, and cited Bennet qui tam v. Smith, 1 Burr. 401; S. C., 2 Ld. Kenyon's Rep. 82.

Crooks, contra, cited Ch. Arch. Prac. 1411; Cortessos v. Hume, 2 Dowl. 134; Wood v. Cleveland, 2 Salk. 518; Mes-siter v. Rose, 13 C. B. 162.

ROBINSON, C.J., delivered the judgment of the court.

We do not find that the case of Bennet qui tam v. Smith (1 Burr. 401, S. C. 2 Ld. Kenyon's Rep. 82), has been over-ruled, and we think we are bound by it to decline to relieve the plaintiff from a judgment of non pros. regularly signed against him, and not obtained by any sharp practice.

Rule discharged.

CUMBERLAND AND STORM V. RIDOUT ET AL., EXECUTORS
OF RADENHURST.

Verdict by consent—Certificate for costs—Rule of court, No. 155.

Where an action was brought on an open account, and a verdict entered by consent for the amount claimed, which was within the jurisdiction of the county court: held, (dissenting from Bonter v. Pretty, 9 C. P. 273), that it was a case in which, under the rule of court, No. 155, a judge in chambers could make an order for full costs.

[QUEEN'S BENCH, T. T., 1860.]

Action on common counts, for services as architects.

Pleas.—Never indebted, and payment. Verdict for the plaintiffs £70 10s. 6d.

The plaintiff's attorney made an application to a judge in chambers for an order under our rule of court to tax Queen's Bench costs, notwithstanding the amount of the verdict was within the jurisdiction of the county court. He stated in his affidavit that the action was brought for the plaintiffs' services as architects in preparing plans and specifications and superintending a building, and that the sum claimed was a sum beyond the jurisdiction of the county court: (the sum claimed was just what was allowed, £70 10s. 6d., it included £5 10s. 6d. for interest) that the plaintiffs delayed the trial of the cause to give the defendants an opportunity of settling it; that at length, when he plaintiffs' attorney was about to call on the case, one of the defendants

(the acting executor) came to him in court, and being told by him that the case was coming on signed a consent that a verdict might be entered for the amount claimed; that a certificate was not applied for, from the fact that the case could not be brought in the inferior court; that the demand was upon an open account for services, and not liquidated or ascertained by the signature of the defendants. The plaintiffs both made affidavits to the same effect.

The particulars delivered were a charge of 5 per cent. commission on a contract for £1,300, £65, and the interest added.

The motion being refused in chambers, Harman moved in full court on the same affidavits.

ROBINSON, C.J., delivered the judgment of the court.

The question is whether this is a case in which the court or a judge could make an order for full costs under our rule of court, No. 155, as being "an action of the proper competence of the county court, in which final judgment was obtained without a trial."

In our opinion it does come within the intention and spirit of that provision, for there was no trial, no evidence received, nothing said or done that could give the judge who signed the verdict any more means of knowing whether it was proper to bring the action in the higher court than if he had never heard of the cause.

A judge in chambers can conveniently receive affidavits and make an order, and it would be most inconvenient to compel a judge at nisi prius to receive evidence for no other cause than to entitle the plaintiff to a certificate.

The Court of Common Pleas in *Bonter v. Pretty* (9 C. P. 273) have, however, decided otherwise.

SCOTT v. McRAE.

A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside.

[CHAMBERS, 31st January, 1861.]

Mr. Justice Hagarty, on the 15th of January, 1861, granted a summons on the sheriff of the county of Haldimand, and on the plaintiff, or his attorney, &c., to shew cause why the property replevied in this case should not be delivered up to the defendant; and on the 19th of January, 1861, he granted a summons on the plaintiff to shew cause why the writ of replevin, and the copy and service, and the execution of the said writ, and all proceedings thereon, should not be set aside with costs, on the ground that the property replevied was seized for a breach of the revenue laws of this province, and was at the time it was replevied in possession of the defendant, as collector of customs for the port of Dunville, and was claimed and held as forfeited, and therefore could not be replevied.

ROBINSON, C.J.—Upon the affidavits I make the summons absolute. The Replevin Act cannot, I think, be applied to take a vessel or goods seized for breach of the revenue laws out of the custody of the collector; and upon the facts stated on the part of the collector it would be proper at any rate to set aside the writ under the late statute of 1660, 23 Vic., ch. 45, and by an order properly drawn up under the fourth section of that act,

HAM v. EGAN.

Infancy—Notice of trial—Irregularity—Delay in moving.

The plaintiff in ejectment, though an infant, sued in person. Defendant became aware of the infancy at the first trial of the cause, but the verdict having been set aside he took no objection until after the second trial, when a verdict was given against him for non-appearance. He then moved to set aside the proceedings on this ground, and for want of proper notice of trial. The notice, it appeared, had been endorsed on the issue book, but defendant's attorney swore that he did not perceive it until too late to prepare for trial.

Held, that defendant was precluded by his delay, and the court refused to interfere.

[QUEEN'S BENCH, E. T., 1860.]

In this case the plaintiff suing was an infant (about 17 years of age). There was nothing on the face of the record to give notice that he was an infant. The writ was sued out by him in person.

The case went to trial at Cobourg in the autumn of 1859, when a verdict was rendered for the defendant, which this court set aside, granting a new trial on the law and evidence.

At the last assizes the case came down to trial before Robinson, C.J. The defendant did not appear when called, and a verdict was therefore entered for the plaintiff under the Common Law Procedure Act, sec. 237, on account of his non-appearance.

Galt, Q.C., moved in the following term to set aside the verdict, and all subsequent proceedings, for irregularity, no proper notice of trial having been given to the defendant, on grounds disclosed in affidavits filed; or for a new trial between the parties, the defendant having been taken by surprise.

The defendant's attorney now swore that he did not know the plaintiff was an infant till the first trial of this suit, but supposed the plaintiff to be the father of the person who was suing, the father's name being John Vandal Ham, and the son's John Vandal Ham.

The defendant's attorney swore that no *prochein amy* or guardian (*ad litem*) had been appointed: that he was served with no notice of trial, except one endorsed on the issue book, which he did not perceive till the Saturday before the assizes (which opened on Monday), and he then observed it was signed by N. G. Ham as the plaintiff's attorney.

He swore that he could not prepare for the trial after discovering the notice: that defendant had built a brick house on the land in question while he had been in possession, worth several hundred pounds; but he did not state what right he had to possession, nor swear to merits in any form.

ROBINSON, C.J., delivered the judgment of the court.

It would be altogether contrary to the practice of the court to entertain at this stage a motion to set aside the proceedings summarily on the grounds of objection taken.

The defendant's attorney admits that he knew at the time of the first trial that the plaintiff was an infant. Still in the interval between that trial and the last he took no steps to set aside the proceedings, but allowed the expense of another trial to be incurred without intimating that he had such an objection to urge.

Then as to the notice of trial, the defendant's attorney received it about three weeks before the trial, endorsed, in a way very usual, upon the issue book. Not examining the paper he received he did not observe, as he says, the notice of trial till two days before the trial.

This failure to examine the paper should not give him any particular privilege in moving on the ground of irregularity; and keeping the notice till it was too late to serve another he cannot object on such a ground as he has taken, admitting that it would have been sufficient if he had not lain by.

Supposing, however, that by the accident the defendant's attorney mentions, he was prevented from preparing for trial till it was too late to procure his witnesses, we should be inclined to relieve him, and give him an opportunity of trying the title, if he had stated on affidavit that he had any title to set up, and given us any general statement of the nature of it. But the defendant has not even sworn to merits in the ordinary form. For all that he states he may have no right whatever to the possession, and may only desire to have another opportunity of putting the plaintiff to proof of title, while he, the defendant, has no title himself.

Rule refused.

KERR ET AL. V. FULLARTON ET AL.—CORNWALL ET AL.
GARNISHEES.*Garnishment—Interpleader.*

Where proceedings are taken to garnish a debt, which is claimed by a third party as assignee, there is no power to direct an interpleader issue between such third person and the judgment creditor, to try the validity of the alleged assignment.

[COMMON PLEAS, E. T., 1861.]

In Easter Term McBride obtained a rule nisi to rescind and set aside an order of McLean, J., made in this cause, which ordered an issue to be tried between the above-named judgment creditors and Alexander Gillespie and others, on the ground that the said order was not authorized by the statute in that behalf, and on grounds disclosed in affidavits and papers filed. The rule was granted on the application of counsel for defendant McCollum, and for Gillespie, Moffatt & Co.

The order of Mr. Justice McLean was made on the 17th of May, 1861, and ordered that the claimants, Alexander Gillespie and others named, and the said judgment creditors, do proceed to the trial of an issue in the Court of Common Pleas, in which the claimants should be plaintiffs and the judgment creditors defendants, and the question to be tried should be whether the assignment alleged to have been made by the said Thomas McCollum (one of the judgment debtors) of the judgment recovered by him in the Court of Queen's Bench against the garnishees, was null and void as against the creditors of the said Thomas McCollum, on the ground that the same was made either with intent of giving one or more of the creditors of McCollum a preference, while he was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be in a state of insolvency. The order further directed how the issue should be made up, and when and where tried, and as to the costs, and enlarged a summons, dated the 13th of April, 1861, calling on the garnishees to shew cause why they should not pay the debt due by them to McCollum to the judgment creditors.

There was no dispute as to the right of the judgment creditors against the judgment debtors, and they obtained

an attaching order, which was served on McCollum, one of the debtors, and also upon the garnishees, against whom McCollum had recovered a judgment. The summons on which the attaching order was made bore date on the 6th of April, 1861.

It appeared, however, that on the 20th of March, 1861, McCollum made an assignment of the judgment so recovered against him by the garnishees, to Alexander Gillespie and others, composing the firm of Gillespie, Moffatt & Co. It was sworn that this assignment was absolute and bona fide and made for a valuable consideration, being for an amount equal to the judgment. It was further sworn that Gillespie, Moffatt & Co. had a large judgment against the judgment debtors, and a fi. fa. against the goods of the judgment debtors in the hands of the sheriff of Kent.

On behalf of the judgment creditors, it was sworn that previous to August, 1860, Thomas McCollum was insolvent, and had made an assignment of all his effects for the benefit of certain creditors, which assignment was declared void; that Gillespie, Moffatt & Co. were well aware that McCollum was insolvent and unable to pay his debts in full: that he was insolvent when he made the assignment to them, which they well knew; that such assignment was made with intent to give Gillespie, Moffatt & Co. a preference over the above-named judgment creditors.

J. Read shewed cause on behalf of the judgment creditors. He referred to *Wise v. Birkenshaw*, 29 L. J. Ex. 240; *Wintle v. Williams*, 3 H. & N. 288.

DRAPER, C.J.—The order in question is not drawn up on the consent of Gillespie, Moffatt & Co., who are directed to be made plaintiffs in the feigned issue, and it is not urged on the argument of this rule that they did consent, though it appears the agent of their attorney was heard before McLean, J., when he granted the order.

It is plain the garnishees have no objection to pay the money to the judgment creditors. I rather conclude they are desirous that the money should be disposed of. But

it seems there is an execution at McCollum's suit in the hands of the sheriff against them, and the money will come into his hands, and he *prima facie* should pay McCollum, and he has notice of the assignment by McCollum to Gillespie & Co., and also of the attaching order. But he was no party in applying for this interpleader order, nor is he in any way directly affected by its result. The order is not and does not profess to be made under the statute for affording relief to sheriffs in cases of conflicting claims to the property seized by them.

Neither will this order fall within the first section of the statute respecting interpleading, for that enables the court or a judge to make the interpleader order in case a defendant, after declaration and before plea, in any action of *assumpsit*, *debt*, *detinue*, or *trover*, applies in manner pointed out by the act.

No previous summons was issued, calling on any party to shew cause why such an order as that in question should not be granted. The order was drawn up on reading the summons of the 13th of April, 1861, but that summons only called upon the garnishees and Thomas McCollum, and the attorney of McCollum in the suit of McCollum against the garnishees, to shew cause why the garnishees should not pay to the judgment creditors the amount due from the garnishees or either of them, to McCollum, or so much thereof as would be sufficient to satisfy the debt due to the judgment creditors. The only ground for the intervention of the agent of the attorney for Gillespie, Moffatt & Co., was to shew that they held an assignment of that judgment.

The Common Law Procedure Act authorizes the court or a judge to call the garnishee before them to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor. If he does not appear, or does not dispute the debt, or pay the money into court, execution may be issued against him. If he appears, and does not dispute his liability, the judgment creditor may be authorized to issue a writ against him. But the statute goes no further, and certainly makes no provision for the intervention of a third party, or for calling any other parties, except the judgment

creditors, the judgment debtor, and the garnishees, before the court or a judge, or for making any rule or order to bind or otherwise affect the interests of any such other parties.

But the English courts have held that when the debt sought to be attached has been already assigned by the debtor, the 60th and 61st sections of their Common Law Procedure Act of 1854, do not apply. According to the judgment in the case of *Hirsch v. Coates* (18 C. B. 757), the only course was to try any question of the liability of the garnishee to pay the judgment creditor by writ, under the 64th section of the English act, of which sec. 291 of our Consol. Stats. U. C. ch. 22, is a copy.

The decision in *Hirsch v. Coates* has probably made the want of a power felt to deal with third parties having, or claiming to have, a right to a debt which the judgment creditor is desirous of obtaining an order upon a garnishee to pay. And an act has been passed, 23 & 24 Vic. ch. 126, by sec. 29 of which it is provided that when it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt. I presume that under this and the former acts, the judge having heard the third party, as well as the garnishees and the original parties to the cause, will in his discretion grant or withhold an order on the garnishee to pay. But this act gives no power to direct a feigned issue between any of the parties.

We have not any act containing the provisions of the English statute just cited; and I have not been able to find any legal ground on which to support the order.

In my opinion the rule must be absolute, but without costs.

Per cur.—Rule absolute.

JAMES PURDIE AND CHRISTINA PURDIE, HIS WIFE V.
JOHN WATSON AND WILLIAM GASPE HALL, SURVIVING
EXECUTORS OF THE LAST WILL AND TESTAMENT OF
JOHN GOWIE WATSON, DECEASED.

Judgment—Executions—Mistake—Amendment.

Plaintiffs sued defendants, describing them as executors of one W., on their promise to pay a legacy left to the plaintiff by testator, in consideration of his forbearing to sue. Defendants pleaded only payment, and the plaintiffs obtained judgment on the 7th of July, 1859, which by mistake was entered against defendants as executors, to be levied of the goods of the testator in their hands, et si non de bonis propriis. A fi. fa. goods issued next day in accordance with this judgment, to which the sheriff returned £29 12s. made of the goods of defendants, and that they had no more goods. In October following a fi. fa. residue issued against the lands of testator, and in December, 1860, a ven. ex., under which, in February, 1861, the sheriff sold all the interest of the defendants as executors in the lands of W., which was purchased by one of the plaintiffs, but had not been conveyed.

The plaintiffs in May, 1861, applied to amend the judgment, by striking out the direction to levy of the testator's goods, and to amend the writs also accordingly; and they produced a paper signed by defendants, in September, 1859, in which they recited that a fi. fa. had issued against their goods, which they could not satisfy, and agreed that the plaintiff might take execution against their lands for the balance, with interest at 12 per cent. .

The court, under these circumstances, amended the judgment and fi. fa. goods on payment of costs; and set aside the fi. fa. lands, leaving the plaintiffs to take out a new writ against defendants' lands.

[COMMON PLEAS, E. T., 24 Vic.]

The plaintiffs declared against the defendants, "surviving executors of John Gowie Watson, deceased," setting forth that J. G. Watson on the 19th of August, 1854, by his last will gave to the plaintiff Christina £200, and made the defendants with others executors thereof: that J. G. Watson, on the day and year aforesaid died, without altering or revoking his said will as to the said bequest: that defendants took on them the execution of the will, and that effects of J. G. W. to the value of £1,000 came to their hands, which were more than sufficient to pay the just debts, legacies, and funeral expenses of the said J. G. Watson, and the charges of proving; by reason whereof the defendants became liable to pay to the plaintiffs the said sum of £200, and in consideration thereof, and that the plaintiffs, at the request of the defendants, would forbear to proceed against them for recovery of the said sum for three months then next following, promised to pay the plaintiffs the said sum of

£200. Averment, that the plaintiffs did forbear. Breach, non-payment.

Common counts were added.

The defendants pleaded payment, and at the trial the plaintiffs had a verdict for £175.

Judgment was signed on the 7th of July, 1859, that the plaintiffs recover against the defendants the moneys aforesaid by the jurors in form aforesaid assessed, and also £15 19s. 1d. costs, which said moneys and costs in the whole amount to £190 19s. 1d., to be levied on the goods and chattels which were of the said John Gowie Watson at the time of his death in the hands of the defendants as executors as aforesaid to be administered, if they have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered, then the debt and costs to be levied of the proper goods and chattels of the defendants.

The statement on the judgment roll of the postea was, "and a jury of the said county summoned also came, who being sworn to try the matter in question between the parties, upon their oaths say that they find a verdict for the plaintiffs for one hundred and seventy-five pounds."

On the 8th of July, 1859, a fi. fa. against goods, pursuant to this judgment (with some errors) issued to the sheriff of Essex, to which the sheriff returned that he had made of the goods of the defendants £29 12s., parcel, &c., and that the defendants had no more goods, &c.

On the 5th of October, 1859, a fi. fa. for residue issued against the lands of J. G. Watson, deceased, to levy £161 7s. 1d., and on the 26th of December, 1860, a writ of ven. ex. was issued.

In Easter Term McBride obtained a rule nisi to amend the judgment roll, by striking out so much as directs the damages to be levied of the goods and chattels of John G. Watson, and to amend the fi. fa. against goods and against lands and the writ of ven. ex. accordingly.

He filed a copy of the judgment roll and of the several writs mentioned, and an affidavit of the sheriff of Essex, that

on the 28th of February, 1861, he sold all the interest of the defendants as executors as aforesaid in the lands and tenements of J. G. Watson, &c., for the sum of \$870; and that Christina Purdie, one of the plaintiffs, was the purchaser; but it would seem that no conveyance had been executed.

A paper was put in, proved to be signed by the defendants, entitled in the court and cause, as follows:

“Whereas a writ of *fi. fa.* against the goods of the defendants has been issued as well for the debt as the costs in this cause, and they are unable to pay the same, it hath been agreed that in consequence thereof the plaintiffs should take execution against the defendants’ lands for such balance of execution as may remain unsatisfied after having allowed credit for the sum of \$77.90, and the further sum of \$40 to be paid to John McEwan, Esq., sheriff of Essex, and that the said writ against lands shall be endorsed for such balance, with interest thereon at the rate of 12 per cent. per annum, from the first day of July last. Windsor, 16th September, 1859.”

H. B. Morphy shewed cause.

The only cause shewn was the filing an affidavit stating that in the registry office of the county of Essex, on the 11th of July, 1859, a certificate was duly registered of the judgment entered in this suit being entered on the 8th of July, 1859, for £200 debt, and £15 19s. 1d. costs.

DRAPER, C.J.—The defendants are certainly sued on a cause of action which they are personally responsible for—namely, to pay a legacy, in consideration of forbearance: and they admit their liability, by only pleading payment.

The judgment therefore against the estate of the testator would seem erroneous, first, because the defendants are not sued as executors, but are merely described as such; and second because by the forbearance at their individual request they admit the money to satisfy the legacy to be or to have been in their own hands, and have appropriated it to the use of the legatee.

This application involves, in my opinion, a good deal of

difficulty. The judgment was entered on the 7th of July, 1859, and the plaintiffs saw fit to enter it against the defendants as executors, to be levied of the testator's goods, et si non de bonis propriis. They have issued a *fi. fa.* in accordance with this judgment, but it would seem there were no goods of the testator, and the only levy has been out of the defendants' goods, and so far what has been done would be supported by an amendment such as is prayed for, that is, the sale of the defendants' own goods.

They next issued a *fi. fa.* against the testator's lands (on the 5th of October, 1859), following by a *ven. ex.*, on which in February last the testator's lands—or, as expressed in the sheriff's affidavit, the interest of the defendants as executors in the testator's lands—has been sold, though there has been no conveyance.

The application to amend embraces the judgment and all these writs. First, as to the judgment. The powers given by the Common Law Procedure Act do not extend to this case. We could only act upon what Lord Campbell, C.J., in *Cannan v. Reynolds* (5 E. & B. 305), calls “a general equitable jurisdiction over our own judgments.” As to lapse of time, his lordship says: “It becomes after a season a bar, so soon as the court in its discretion sees that it has been such as must work prejudice.” In the same case Coleridge, J., observes: “It is sought to set aside a judgment signed as the plaintiff intended it to be signed, on the ground of mistake, in order that the plaintiff may not be precluded by it.” Erle, J., doubted, thinking that the jurisdiction to set aside a judgment had not up to that time been carried so far. The judgment there had been signed by default on the 16th of January, 1855, for a wrong sum, of which some of the defendants in that suit were seeking to take an unjust advantage in another suit, brought by the plaintiff against them and others. They had paid the sum for which judgment was signed, with costs, and in June, 1855, the rule to amend the judgment was granted. Crompton, J., observed that the only point on which he had felt some doubt was whether the lapse of time had not been so considerable that it ought in itself to be a bar to the application, which was

not put on the ground of fraud but of mistake. Subject to the effect on the discretion of the court of the lapse of time, that learned judge saw no reason why the same equitable relief should not be given in case of mistake as well as of fraud.

This decision may afford an answer to any doubt as to the power and authority of the court to make such an amendment. Here there is a palpable mistake, of which the defendants do not apparently seek to take any advantage, and the consent of the 19th of September, 1859, contains a plain admission of their liability to the claim, and even of their willingness to submit to terms such as the court would never have imposed; I allude to the payment of 12 per cent. per annum.

Upon these grounds we may, I think, go the length of amending the judgment; and as to the *fi. fa.* against goods, it went not only against the goods of the testator, but against those of the defendants also. It has been executed against the latter only, and the agreement of the 19th of September, 1859, acquiesces in what has been done. I feel less difficulty in making this amendment than in amending the judgment.

But I do not think we ought to amend the *fi. fa.* against lands. That writ was against the lands of the testator alone, and the amended judgment will leave that writ without a shadow of support. It will be a void writ, as having no judgment to rest upon, and the proceedings taken under it will fall with it. Having a *fi. fa.* against goods with a return, the plaintiff can sue out a new execution against the defendants' lands, and there will be no risk of any interference with the rights of the parties as to lands of the defendants which may have sprung up since the judgment was entered. If the present writ were continued in force in the amended form asked for, inasmuch as the sheriff received it on the 9th October, 1859, questions might be raised as to its possible effect in binding the defendants' lands, which it seems to me it would be more just to prevent or avoid.

I think, therefore, the rule should be made absolute to amend the judgment and *fi. fa.* against goods as prayed, upon

payment of costs, including all costs attending the issuing and subsequent proceedings upon or connected with the fi. fa. against lands, no part of which should in any way be borne by these defendants; and it may be safer, as a condition of granting this relief, to set aside that writ against lands and all subsequent proceedings thereon.

Per cur.—Rule accordingly.

BOYD v. BARTRAM.

Seduction—Ca. sa.—Application for discharge.

A defendant in custody under a ca. sa. issued against him for not answering satisfactorily interrogatories on a judgment obtained in an action of seduction, held, a debtor, entitled to apply for his discharge under Consol. Stats. U. C., chaps. 24, 26.

[Q. B., H. T., 1862.]

M. C. Cameron obtained a rule on the plaintiff to shew cause why the defendant, who was in close custody on a capias ad satisfaciendum in this cause, should not be wholly discharged from custody, on the ground that he was not worth £5.

The defendant had applied for his discharge to a judge in chambers, who directed the summons to be made returnable in full court.

The application was made under chapter 26 Consol. Stats. U. C., secs. 7 and 8.

The defendant was in execution on a judgment obtained against him by the plaintiff for the seduction of the plaintiff's daughter. He had answered interrogatories put to him as a judgment debtor; and upon his answers, which were not deemed satisfactory, a ca. sa. was allowed to issue, under the same statute.

In August last, having given notice of his intention to move for his discharge as an indigent debtor, interrogatories were administered to him, which he answered to the same effect as upon his former examination.

R. A. Harrison shewed cause.—Besides objecting to the defendant's answers as unsatisfactory, he contended that this

was not a case for discharge under ch. 26, secs. 7 and 8, the defendant not being a debtor within the meaning of that act; and, secondly, that not being committed on a ca. sa. issued upon the ordinary affidavits, but on account of his evasive or unsatisfactory answers when examined as a judgment debtor, he was to be regarded as being in quasi for a contempt, and not like a debtor in custody on a ca. sa. sued out in the ordinary course. *Upthegrove v. Winters*, 6 U. C. L. J. 88; *Purcell v. McKeown*, *Ib.* 58; *Aitkin v. Bullock*, 11 U. C. R. 19; *Consol. Stats. U. C. ch. 26, secs. 7, 8, 10, and 11.*

M. C. Cameron, contra, cited *Henderson v. Dickson*, 19 U. C. R. 592; *Consol. Stats. U. C. ch. 24, sec. 39.*

ROBINSON, C.J., delivered the judgment of the court.

So far as regards the answers, we think they are such as may well lead to the suspicion that the defendant was resolved to dispose of what little property he had to any other creditors rather than be compelled to pay this judgment: and whether he really did owe the debts which he swore he paid his mother, and brother, and brother-in-law, may well be doubted. He gives no proof of them beyond his own statement on oath.

On the other hand, we feel no strong conviction that he has it now in his power to pay this debt, or any considerable part of it, further than by letting his watch go to the plaintiff on a valuation, or allowing it to be sold by the sheriff, and on condition of that being done we are inclined to discharge him. But this is apart from the legal objections which are to be disposed of.

Then as to the legal objections: though it is quite true that the judgment was not obtained against the defendant on the ground of any debt due by him to the plaintiff, yet we are of opinion that he is nevertheless to be treated as a judgment debtor (which in fact he is), within the view and for the purpose of applying the provisions of the statutes, *Consol. Stats. U. C. chaps. 24 and 26.* And this we take to have been always so held as regards the right of a person in execution upon a judgment for damages for seduction, or

any other wrong, to obtain the weekly allowance as an indigent debtor, not that he was a debtor before the judgment, but because he is a debtor by the judgment.

And we have no doubt that on the same principle such judgment debtors are liable to be committed, or entitled to be discharged after examination upon interrogatories, under any of the provisions contained in ch. 24. That the legislature meant this to be inferred from the sections 1, 7, and 8 of ch. 26, and is indeed made too clear to admit of any dispute by the express words of section 11 of that act, under which it remains for us to say whether we shall direct him to be committed for close custody for a limited period before we discharge him, or whether we shall discharge him at once; and this is the only question.

After considering all that is before us, and the time that the defendant has already been in custody, we have determined to grant a rule for his discharge, on the gold watch being given up by him to the plaintiff, if it has not already been.

BALFOUR V. ELLISON ET AL., EXECUTORS OF ÆNEAS SAGE KENNEDY.

Judgment—Right of subsequent creditors to move against.

A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain.

[PRACTICE COURT, E. T., 1859.]

J. B. Read, on behalf of a subsequent judgment creditor, moved to set aside the judgment issued in this cause, and the fi. fa. issued thereon. Several grounds of objection were taken, and among others, that if such judgment is intended to be a judgment by default of defendants' appearance to the action, the said judgment is not justified by the writ of summons filed, as the judgment contains no copy of the special endorsement on said writ, as required by the statute in that behalf; that the said judgment is fraudulent and void as against creditors of the said Æneas Sage Kennedy, deceased, on account of the plaintiff having caused the same to be

entered without sufficient authority from the defendants so to do; or on the ground that, if such authority was given, it was by the plaintiff's collusion, or that of his attorney or agent, and for a much greater sum than ought to be recovered by the plaintiff against the estate of the said Æneas Sage Kennedy: that there is no judgment to warrant the fieri facias issued, the judgment signed in this cause not being against the estate of the said Æneas Sage Kennedy, or even against the defendants as his executors, but against the defendants personally.

BURNS, J.—The question raised by the affidavits of Bown, a subsequent judgment creditor, that the plaintiff's judgment was a collusive one, and fraudulent, is met by the plaintiff, and I think anything like fraud or collusion is sufficiently answered and repelled, and therefore I can neither set aside the judgment nor grant an issue to try the validity of it upon that ground.

All the other objections resolve themselves into regularity of the plaintiff's proceedings, and certainly there seems no want of points of irregularity as the papers stand at present, but perhaps they may be amended and set right upon an application for the purpose. The plaintiff's judgment was not obtained upon a specially indorsed writ, as would appear by the judgment, though the writ of summons was specially indorsed. The affidavit of Mr. Read, attorney in this suit for the defendants, shews that an appearance was entered by him, and after service of the declaration he suffered judgment by default as the least expense to the estate.

The writ of fi. fa. in the sheriff's hands does not appear to be supported by the judgment, certainly, for the judgment is not entered against the defendants as executors. If Bown can obtain a priority over the plaintiff by reason of there being no judgment to warrant the execution, then he can do so by notifying the sheriff of it, and to proceed upon his execution, but I know of no authority which authorizes a stranger to the action asking the court to interfere with the proceedings of another party, whether those proceedings amount to an irregularity or to a nullity. If the proceedings

are void the stranger cannot be prejudiced, and if irregular only, he cannot complain. I know of no other ground of interference than when it is complained that the power and process of the court is used for a fraudulent purpose. See *Perrin v. Bowes* (5 U. C. L. J. 138).

Rule discharged, with costs.

COCHRANE V. SCOTT ET AL. AND COCHRANE V. CROSS ET AL.

Reference to arbitration—Costs.

Two actions for false imprisonment were referred to arbitration at the assizes, no verdict being taken, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award, held, that he was entitled to full costs without a certificate.

Such a case is not within the 155th rule of court, for the plaintiff cannot be considered as proceeding upon a final judgment.

Quære, whether under C. L. P. A., 1856, sec. 12, a judge's order is not necessary to have taxation revised by the principal clerk.

[CHAMBERS, 10th February, 1859.]

The plaintiff in this case applied to revise taxation, on grounds which sufficiently appear in the judgment.

BURNS, J.—Both of these cases were actions against the defendants for false imprisonment, in consequence of the writs to hold to bail being set aside for irregularity. When they came down for trial at the assizes at Stratford, in the spring of 1858, by consent of parties the causes were referred to an arbitrator, no verdicts being taken. The costs of the cause in each and the costs of the reference were ordered to abide the event. The arbitrator made his awards, and in the first case awarded £20 to the plaintiff, and in the second case £10. The plaintiff proceeded then to tax costs, and the deputy clerk of the Crown for the county of Perth taxed to the plaintiff full costs in each case. The plaintiff after that proceeded to demand the sums awarded and costs, and upon non-payment applied to the court to enforce the awards by attachment. The defendants resisted these applications, and the matter came on to be heard in Trinity Term last, before me in the Practice Court. The rules were made absolute for the attachment, but ordered to lie in the office a certain

length of time, to afford an opportunity to have the costs taxed correctly and upon a proper scale, as a question was raised with respect to the costs as taxed by the deputy clerk of the Crown.

The order then made was special, directing an application to be made to a judge in Chambers, at least that was what I contemplated at the time. I had overlooked the provision of the 12th section of the Common Law Procedure Act. Upon looking at that section now, I see I have made a note in the margin to that section in my copy, that some of the profession say, and have acted upon it, that they may as a matter of course have the costs re-taxed by the principal clerk: that I doubt that being the true construction: that the revision should be by a judge's order for the purpose. Be that as it may, however, the defendants in these cases availed themselves of the construction put upon the clause by the profession, and carried the taxation before the principal clerk. The plaintiff declined to attend this taxation, because he considered it a violation of the order made when directing the attachment to lie in the office till a taxation procured in accordance with it. The master in the first case taxed the plaintiff's costs on the scale of the county court, and then allowed the defendants their costs, that is, the difference of costs between the two courts to be deducted from those: and in the second case he allowed the plaintiff only division court costs, and taxed to the defendants their full costs.

The application now before me is made by the plaintiff, that the master shall review his taxation, and the question is simply this, whether he has taken a correct view of the matter. At the time of the argument I was under the impression that this very point had been before me in some shape sometime since, and I find it was in *Jones v. Reid* (1 P. R. 247). In some measure the same question was before Mr. Justice Richards in *Morse v. Teetzel* (Ib. 375). In this last case an order was made for full costs, but that case differs from *Jones v. Reid* and from this case, for no verdict was taken in either of them, and it is through the verdict the court deals with the question of costs, and under the rule of court by means of the final judgment.

I still adhere to my opinion expressed in *Jones v. Reid*, that where the parties refer a case to arbitration without taking any verdict, the different provisions of the statutes referred to do not apply. The provision in the rule of reference that costs shall abide the event, are not equivalent to saying that the plaintiff shall not have costs without a certificate, for the judge who tries the cause may grant the certificate, notwithstanding the verdict be within the jurisdiction of the inferior court. A judge cannot certify, in my opinion, when there is no verdict which enables him to say the court has possession of the cause; that is, I mean cannot certify under the different statutes.

Then as to the rule of court. The case of *Jones v. Reid* was decided before the new rules, but I apprehend there has been no difference in that respect. The 155th rule is that costs shall be taxed on the scale of the Inferior Court, if there be no special order of a judge, in any action of the proper competence of the County Court in which final judgment shall be obtained without a trial. If the plaintiff had gone to the master with an award upon which he could have obtained a final judgment, and was entering up that judgment, then the master would have been right. This is not such a case. The plaintiff proceeds upon the award and not upon any judgment, and therefore the question is just this, whether, when an award is made in a case where no verdict has been taken, but the parties are proceeding upon the award, it is to be considered as a final judgment within the meaning of the 155th rule. I think it is not, and therefore the master was wrong in thinking he had jurisdiction to deal with costs on the smaller scale.

The case of *Jones v. Reid* was decided in the Practice Court, from which there could be no appeal, but this case being in Chambers the defendants have a right to apply to the court to rescind my order if my view of the law be incorrect.

The summons for revision must be absolute, but it will be without costs.

McKENZIE ET AL. V. McNAUGHTON ET AL.

Application to set aside judgment—Delay—Misnomer—Amendment.

A summons was served on the 19th of February, 1859, and final judgment signed for want of appearance on the 24th of December, 1860, and execution issued. Defendants on the 21st of January, 1861, moved to set aside the judgment on the ground that it had been signed more than a year after the summons was returnable, and without giving a term's notice. Held, that the application was too late.

One of the defendants, Edmund M., correctly styled in the summons, was by mistake named in the judgment roll and executions Edward M. Held, amendable.

[CHAMBERS, 31st January, 1861.]

This was a summons to shew cause why the final judgment in this cause should not be set aside with costs.

1st. Because the defendants were served with process (summons) on the 19th of February, 1859, and no proceedings taken till the 24th December, 1860, when final judgment was entered against all the defendants (one of the defendants, Edmund McNaughton, being designated therein as Edward McNaughton) for want of appearance, for £809 9d. and costs.

2nd. Because there was a variance between the judgment roll and execution and the writ of summons, the style of the cause in the summons being the same as in this summons, while the style of the cause in the roll and executions called defendant Edmund McNaughton Edward.

3rd. Because the plaintiffs did not give a term's notice, although more than a year had elapsed since the last proceeding.

In answer to the summons the plaintiffs' attorney made an affidavit to the effect that the delay in entering judgment was agreed upon between him and the defendants; that the defendants undertook not to enter appearance, as they had no defence, and had engaged to pay off the debt within eighteen months, and had made small payments from time to time, but little more than sufficient to keep down the interest; and that in December last, finding that other people were pressing, he entered up the judgment. He swore also that he believed the application to set aside the judgment was made, not at the instance of the defendants, but of a creditor of theirs who took out an execution against them for a large

debt, and placed it in the sheriff's hands a few minutes only after the execution in this case was delivered to him. In this affidavit it was alleged that the agreement with the plaintiffs' attorney for delay was made between him and Andrew McNaughton, one of the defendants.

On the part of the defendants, Andrew McNaughton made an affidavit that after his first interview with the plaintiffs' attorney about this suit he always believed that the suit had been withdrawn; that this application was not made on behalf of any other of their creditors, but with the idea that if he could succeed in getting the judgment set aside he could then make arrangements to pay all the creditors equally: that he had often applied to the plaintiffs' attorney for an account of their debt, but had never received one.

It was not denied that the name of Edward was by mistake given as the christian name of one of the defendants in the judgment roll instead of Edmund, the name properly given in the summons.

ROBINSON, C. J.—By the Common Law Procedure Act, 1856, section 107, it is enacted that a plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable.

The judgment being entered on the 24th of December, 1860, the defendants move against it for irregularity in being signed too late, that is, more than a year after the summons was returnable; but they come, as appears, not before the 21st of January, 1861, which is too late according to the practice, and I think this is a case in which the application should not be favoured.

The same objection, of being too late in moving, applies to the other ground of not giving a term's notice, if indeed such an objection could be taken when the defendants have not appeared.

As to the mistake in the christian name of one of the defendants, Edward for Edmund, that can be cured by amendment, as the summons gives the true name.

I think that the name of the defendant, Edmund McNaughton, should be amended in the judgment roll and the

writ or writs of execution that have issued under it by making it conform with the name in the summons, and that this summons should be discharged, but not with costs.

WILSON V. THE DETROIT AND MILWAUKEE RAILWAY
COMPANY.

C. L. P. A. sec. 17, construction of—Service on foreign corporation.

The first part of sec. 17 of the Common Law Procedure Act, applies only to corporations whose chief place of business is within Upper Canada; the remainder to foreign corporations.

Where therefore a writ of summons against a foreign corporation was served in Upper Canada upon the president, but it was not shewn that he transacted any business of the company there, the service was held bad.

[QUEEN'S BENCH, H. T. 1860.]

M. C. Cameron obtained a rule nisi to rescind an order made by Mr. Justice McLean on the 4th February, 1860, setting aside the copy of the writ of summons issued in this cause, and the service of the same.

The ground for moving was that there was no irregularity in the service of the writ of summons or in the copy, for that a foreign corporation might by the law of Upper Canada be sued and served within Upper Canada with process issued from any of the courts of this province.

The writ was tested 31st October, 1859, from the principal office in Toronto, in a suit in B. R.

The plaintiff claimed by endorsement on the writ £5,000 damages.

The application in Chambers was made on an affidavit of C. J. Brydges, Esquire, of Hamilton, in this province, stating that he was president of the defendants' company, a foreign association incorporated under a statute passed by the legislature of the State of Michigan: that the chief office of the corporation was at Detroit, where the secretary of the company resided, and where the meetings of the directors were held at which the deponent presided, being president of the company: that the company did not carry on its business in Canada, but in the State of Michigan: that the copy of the summons in this cause was served on him (Brydges) at Hamilton, on the 21st of January, 1860: that the company

had no board of directors in Canada: that they had not appointed any person to be their attorney at law to appear for them in any Court in this province, and that they had no property in this province, either real or personal.

The exceptions taken by the defendants were that they, being a foreign corporation not carrying on business in this province, could not be sued therein, and that the copy of summons served on the president was not a good service.

The summons was opposed by an affidavit on the part of the plaintiff that the action was brought to recover for services rendered by the plaintiff to the defendants in England, in negotiating the raising of money for them, and for his expenses in going from Hamilton (in Upper Canada) where he resided, to England; that his instructions to render the service were received by him in Upper Canada, from whence he went to England, and that no part of the service was rendered in the United States: that the action was not brought on any written contract, but for work and labour rendered by the plaintiff for defendants, and commission payable to him.

There were affidavits filed on the part of the defendants, stating that the services referred to were rendered by the plaintiff under a written contract entered into by the plaintiff at Detroit, in 1854, with a company then existing called the Oaklands and Ottawa Railway Company, and executed by both parties there, and that the interests of that company were afterwards bought out by these defendants, and further, that the defendants had no attorney at law in this province, but that in consequence of the peculiar circumstances of this case it had been found necessary to instruct an attorney and counsel in Canada to move against the writ; that the cause of action sued upon (if any) was believed to have arisen some years before the deponent, Mr. Brydges, was president of this company now sued, and in respect of certain transactions with other railway companies, which were then separate lines, but now formed parts of the defendants' railway company: that this cause of action (if any) arose out of this province, and beyond the jurisdiction of this court.

Irving shewed cause and cited Consol. Stats. U. C., ch. 22, sec. 17, Common Law Procedure Act; *Ingate v. La Commissione del Lloyd Austriaco*, 4 C. B. N. S. 704; *Wilson v. The Caledonia Railway Company*, 5 Ex. 822; *Evans v. The Dublin and Drogheda Railway Company*, 2 D. & L. 865.

ROBINSON, C.J., delivered the judgment of the court.

The cases cited from English courts do not assist in determining the present case, because they all were governed by the terms of particular statutes, which in general varied from each other in the provisions respecting the service of process, and all differ from ours.

In disposing of this application to set aside the order made in Chambers, we must be guided entirely by the 17th section of the Consolidated Statutes of Upper Canada, ch. 22, because that is the latest express provision made by the legislature on the subject, and was in force when the copy of process in this case was served.

The first part of that section, we think, down to the words "Upper Canada," in the middle of the section, apply only to corporations whose chief place of business is within Upper Canada, and not to foreign corporations.

The remainder only of the section applies to foreign corporations, and they may be served with process by making the service upon any person who "within Upper Canada transacts or carries on any of the business of or any business for any corporation whose chief place of business is without the limits of Upper Canada."

According to this view of the intention and effect of the clause, which we think is correct, the order was rightly made for setting aside the service in this case, for though Mr. Brydges was at the time president of the foreign corporation, it is not shewn that he transacts within Upper Canada any of the business of or any business for the defendants.

Rule discharged with costs.

HUMBERSTONE V. HENDERSON.

Costs—Title to land in question.

Semble, that where in trespass quare clausum fregit defendant pleads that the land was not the plaintiff's, the plaintiff, if he succeeds, is entitled to full costs, though title is not brought in question at the trial (as in this case it was held to be), and the verdict is within the jurisdiction of the county court.

[QUEEN'S BENCH, T. T. 1861.]

McMichael moved to set aside the taxation of costs in this case, and for revision, on the ground that the master taxed full superior court costs to the plaintiff, whereas division court costs only should have been taxed, because the verdict shews the cause to have been within the proper competence of the division court, the title to land not having come in question, and the judge who tried the cause not having certified for costs.

And on the ground that at least it was only in the competence of the county court, and that whether within the one inferior court or the other, full costs should not have been taxed.

The action was brought in the Queen's Bench. The plaintiff in his declaration charged the defendant with having broken and entered the plaintiff's lot 21, in the 4th concession of North Gwillimbury, and cut down and taken therefrom timber to the value of £50.

Defendant pleaded: 1st. Not guilty. 2nd. License. 3rd. That the land in the declaration mentioned, in which, &c., was not the land of the plaintiff, in manner and form, &c.

At the trial before Hagarty, J., a verdict was given for the plaintiff for £10 damages.

The plaintiff moved immediately after the trial for a certificate to entitle him to superior court costs. The judge declined to grant it. The defendant's counsel certified (for the master's information) that no question of title arose at the trial, but that, on the contrary, the plea by which the plaintiff's title or possession as put in issue was expressly abandoned before the plaintiff went into his case, and such abandonment noted by the judge.

On the other hand, it was sworn that on the trial evidence was given in reference to the line between the land of the

plaintiff and the land of the defendant, and a surveyor examined as a witness as to the line.

The plaintiff swore that he owned a lot adjacent to a lot owned by defendant: that this action was brought to determine where the boundary line between the two lots was, the defendant having, as the plaintiff contended, trespassed on the plaintiff's lot by crossing the line and cutting trees upon it: that the defendant, on his part, contended that there had been no line run between them, and that the trees he had cut down stood on his own lot.

Upon a reference made to the learned Chief Justice of this court in chambers, he held that the plaintiff was entitled to superior court costs, which were taxed accordingly. The propriety of that ruling was questioned by this application.

ROBINSON, C.J., delivered the judgment of the court.

In *Cannon v. Smallwood* (3 Levinz, 203), the court determined that a County Court had no power after freehold pleaded to proceed in the cause, neither directly nor collaterally, and that any proceedings after that was pleaded were *coram non judice*, and void.

Our statute, "The County Courts Act," sec. 16, provides that the County Court "shall not have cognizance of any action where the title to land is brought in question."

It cannot be denied that the title to land is brought in question by a plea which denies that the land from which the plaintiff complains that the defendant cut down and took away the trees was the land of the plaintiff, as the plaintiff had asserted it to be in his declaration.

In the case of *Latham v. Spedding* (17 Q. B. 444) the plea was "not possessed," in which the title to land was not so precisely brought in issue as in the present case of a plea which expressly denies the title.

In *Powley v. Whitebread* (16 U. C. R. 589) and *Campbell v. Davidson* (19 U. C. R. 222) we have determined the very point raised here, that by the plea denying title (and not possession merely) the title is brought in question. A prohibition, I consider, would have lain by the defendant, if the plaintiff had sued in the County Court, and had attempted

to go on in that court after such a plea. The plea that the land was not the plaintiff's, required to be sworn to, I think, undoubtedly under the 20th section of the County Courts Act, and for the reason that it brought title in question, as unquestionably it did, and that it was necessary therefore to guard the plaintiff from having such a plea put upon the record vexatiously, and merely to oust the jurisdiction of the inferior court.

The question perhaps is put upon its true ground by Mr. Gray, in his treatise on costs, p. 151, where he is speaking of the case of *Latham v. Spedding*: "It is quite clear," he says, "for a reason apparently not adverted to in the argument or judgment in the above case, that the right to costs cannot depend upon whether the pleadings in the action in the superior court may or must involve a question of title. The question is whether, if the action had been brought in the County Court, the judge of that court would have been able to try it. As there are no pleadings in the County Court, that question must have been determined by the facts proved, and therefore what pleas the defendant put upon the record, the action having been brought in the superior court, does not signify, unless supported by evidence.

As between this court and our County Courts this remark is not applicable, because our County Courts are Courts of Record, having the same formal pleadings as the superior courts; and after the defendant had put in a plea in this action expressly denying the plaintiff's title, it is reasonable to presume that the plaintiff had reason, when he brought his action, to suppose that his title would be questioned, and therefore brought it in a superior court. If he had brought it in the County Court such a plea would have ousted the jurisdiction, and the defendant having pleaded that plea to this action when brought in the superior court, the plaintiff should, we think, be allowed to proceed with confidence with his action, safe from the danger of his losing full costs if he succeeded, for he could not reasonably be expected to consider that the defendant was not in earnest in denying that the land was his.

Besides, in this case the title to the locus in quo was in question, for the plaintiff had to prove whether the land on which the trees were cut was on one side of the true line or the other. Rule refused. (a).

THE QUEEN V. THE TRUSTEES OF SCHOOL SECTION NUMBER
TWENTY-SEVEN, IN THE TOWNSHIP OF TYENDINAGA, IN
THE COUNTY OF HASTINGS.

Peremptory mandamus—Necessity for return—Attachment for contempt—Practice.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ. Such an attachment must be tested in term, on the same day as the rule on which it issues.

The rule nisi called upon the trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, to shew cause why an attachment should not issue against them. On the affidavit of service of this rule on A., B., and C., stating them to be trustees of said section, a rule absolute was granted following it in form, and thereupon an attachment issued against A., B., and C., held bad, as not warranted by the rules.

[CHAMBERS, July 29th, 1861.]

In this case a writ of peremptory mandamus issued on the 5th of July, 1861, returnable on the first of Trinity Term then next, directed to the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, commanding them to levy and collect from the freeholders and householders of the section a sum of money sufficient for the satisfaction of two judgments recovered against them by one John Waterhouse, and recited in the writ.

A former application for attachment had been made for not returning the writ of mandamus nisi issued in the same matter, which is reported in 20 U. C. R. 528.

No return having been made, on the 27th of November, 1861, during Michaelmas Term, Sisson obtained a rule nisi, entitled "The Queen against The Trustees of School Section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and calling upon "the trustees of school section above mentioned," to shew cause why an attachment should not issue against them for contempt in not making a return to the writ.

(a) See Portman v. Patterson, 21 U. C. R. 237.

This rule was personally served on William Cross, James Glass, and Robert Gillespie, and in Hilary Term, 1862, on the 5th of February, C. Robinson moved it absolute, on an affidavit of service stating that on the 21st January, 1862, the defendant did "personally serve William Cross and James Glass, both of them trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, and that on the 22nd of January, 1862, he did also "personally serve Robert Gillespie, another of the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," with a true copy; and that the original rule was at the same time shewn to each of them.

On the 15th of February, during the same term, the following consent was given, endorsed on the copy of the rule nisi:

HILARY TERM.

I hereby consent that the attachment on the mandamus issue upon the expiration of two months after the present term, the trustees paying the moneys collected upon the rate bill to M. Crombie, Esq., counsel for Waterhouse.

WM. PONTON,
Counsel for Trustees.

Thereupon on the same day a rule absolute was granted, entitled, "The Queen against the Trustees of School Section number twenty-seven in the township of Tyendinaga, in the county of Hastings," and ordering "that a writ of attachment be issued forthwith against the trustees of school section number twenty-seven in the township of Tyendinaga for contempt in not making a return to the peremptory writ of mandamus issued in this cause."

On the first day of May following a writ of attachment issued, tested on that day, and commanding the sheriff "that he attach James Glass, Robert Gillespie, and William Cross, the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, so that they may have them before our justices of our Court of Queen's Bench at Toronto, on Friday the 30th day of May

instant, being in the term of Easter, to answer to us for certain trespasses and contempts by them lately done and committed in our said court, and have you then there this writ."

Upon this attachment the said William Cross was arrested on the 26th of May, and committed to the gaol of the county of Hastings, where he had remained up to the time of this application.

On the 22nd of July following, M. C. Cameron obtained a summons calling on her Majesty the Queen, and John Waterhouse, his attorney or agent, to shew cause why the writ of attachment, the arrest of the said William Cross thereunder, and all subsequent proceedings, should not be set aside for irregularity, with costs, and the said William Cross discharged from custody, on the following grounds among others: 1. That the said writ was not warranted by the rule under which it was granted, the said rule authorising an attachment against the corporation styled: "The trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and not against individuals by name, and on an attachment against the corporation no arrest of an individual could be made.

2. That the said writ of attachment was issued for an alleged contempt of this honourable court in not returning a peremptory writ of mandamus, which is no contempt, as no return is necessary; it is disobedience to the command of the writ that is a contempt, and no disobedience of the command is alleged in said writ or in the rule under which the same was granted.

3. That the said writ of attachment is irregular and void, being tested in vacation and not in term, and does not bear date of the day on which the rule under which the same was issued was granted.

4. That no rule to return the writ of mandamus was granted or served on said Cross.

5. That said Cross was arrested under said attachment on the 26th of May last, and was not produced in court on the return of said writ, nor was any motion on the return of

said writ made against him, nor any order or rule of court in respect to him or his alleged contempt, and the said John Waterhouse, the prosecutor, did not move against him or require him to answer interrogatories, nor hath he done any thing in the matter since the arrest of the said William Cross.

C. Robinson shewed cause, citing Tapping on Mandamus, 346, 408, 422, 423, 424; Gude's Cr. Pr. 186; Bull N. P. 201; Burdett v. Sawyer, 2 P. R. 398; Rule of Court in England, 2 Q. B. H. 1844, referred to in Ch. Arch. Prac., 9th Ed., 1612, not adopted here; C. L. P. A., sec. 19.

M. C. Cameron, contra, cited Regina v. Ledgard, 1 Q. B. 619; Rex v. Mayor, &c., of Rye, 2 Burr. 798; Grant on Corporations, 231; Tapping on Mandamus, 461, Rule 4; Ch. Arch. Prac. 1612, rule 2, 1844.

BURNS, J., held that the rule nisi should have called upon the trustees by name, and that the attachment, therefore, although in the proper form, was not warranted by it or by the rule absolute under which it is issued. 2. That the second objection was entitled to prevail; and 3, that the attachment should have been tested in term, on the same day on which the rule absolute was granted, but that this defect being amendable would not alone have been fatal.

He made the rule absolute, but without costs, owing to the consent given on the part of the trustees. The other objections were not noticed in the decision.

BANK OF UPPER CANADA V. RUTTAN.

Interrogatories—Practice.

Under the Common Law Procedure Act, sec. 190, the leave of the court or a judge is necessary to authorise interrogatories either with the declaration or pleas or at any other time.

[Q. B., E. T., 1862.]

The declaration was upon a bill of exchange made and drawn by Sidney Smith, dated the 4th of August, 1859, upon the defendant, and accepted by him.

The defendant pleaded two pleas. 1st. That he did not accept the bill. 2nd. That the bill was paid before action by Smith, for whose accommodation the defendant accepted the same.

At the same time the pleas were served the defendant's attorney served the plaintiff's attorney with a set of interrogatories, requiring Mr. Edward Goldsmith, one of the officers of the bank, to answer the same by affidavit within ten days after the delivery thereof. These were served on the 1st of February, 1862.

No attention being paid to them by any answer given, in Hilary Term last, Beaty obtained a rule calling upon the plaintiff and Mr. Goldsmith to shew cause why an attachment should not issue against Mr. Goldsmith for contempt, in not answering the interrogatories within the ten days.

The affidavit stated that Mr. Goldsmith held the position of assistant cashier of the bank, and had done so for some two years or more past.

The point raised for the consideration of the court was not as to the propriety of the interrogatories put, but whether the defendant had a right to serve them with the pleas without first asking permission of the court or a judge so to do.

The defendant contended that it was incumbent upon the plaintiff during the ten days after service of the interrogatories, if he objected to any of the questions, to apply to strike them out, or that perhaps the point whether the interrogatories were proper and regular might be discussed upon the application for the attachment for not answering, but that in either case the person not answering within the ten days was in contempt, without any order for the allowance of the interrogatories.

C. S. Patterson supported the rule. M. C. Camerou shewed cause.

BURNS, J., delivered the judgment of the court.

The facts disclosed in the affidavits fall short of saying that there was any intention on the part of Mr. Goldsmith, as an officer of the bank, in withholding any information in his

power to give to the defendant, or any reason for saying he ought not perhaps to answer the interrogatories which have been served with the plea served by the defendant. There is, however, a principle of practice involved in this application which applies to all cases, and that applies equally both on the part of the plaintiffs as well as the defendant.

The argument on the part of the defendants in this case is that in consequence of the 190th section of the Consol. Stats. U. C. ch. 22, having dropped the preliminary words with which the section 176 of 19 Vic., ch. 43, was prefaced—that is, that by leave of the court or a judge the plaintiff with the declaration, and the defendant with the plea, may deliver interrogatories—there has been such an alteration of the law that now the plaintiff may with the declaration and the defendant may with his plea deliver such interrogatories as either choose to put to the opposite party, or to such person as the statute provides should answer, without any permission of the court or a judge to that effect first had and obtained.

If such a construction is to be given to the Consolidated Act, it cannot be denied that it is a complete alteration from the statute of 1856, while at the same time it is admitted that if either plaintiff or defendant desire at any other time than with the declaration on one side, or delivery of the plea on the other, to administer interrogatories, before they can be put the leave of the court or a judge must first be had and obtained.

The effect of the act as framed in 1856, was this: that whichever party desired to propound interrogatories to the other, in all cases, whether with the declaration on one side or with the pleas on the other side or at any other time, leave must first be had from the court or from a judge to put them. By adopting the construction contended for by the defendant in this case, it would be thrown open indiscriminately to the plaintiff and the defendant respectively, with the declaration on the one side and with the plea on the other, to put such interrogatories as the ingenuity of counsel might suggest, or perhaps the impertinence of parties might think of, and in-

stead of its being shewn in the first instance that the ends of justice required the interrogatories to be answered before being put, it would be thrown upon the party objecting to apply to have them expunged.

We do not think the legislature in the words of the 190th section of the Consolidated Act ever intended to alter the effect of the 176th section of the act of 1856. It is unfortunate that in the attempt to abbreviate words occasion should have been given to make the present application. We apprehend, if there were any difficulty in the way of construing the clause so as to preserve the rule and practice under the act of 1856, the courts would have power to make a rule to the effect that the leave of the court or a judge should first be had to put interrogatories, rather than that an application should follow them when put to strike them out; but it appears to us quite unnecessary to do so, for we look upon the words in the 190th section of the Consolidated Act, by leave of the court or a judge at any other time, as over-riding the whole clause. It is just as necessary that with the declaration or with the plea the leave of the court or a judge should be had to put interrogatories as at any other time.

Sections 8 and 9 of chapter 1, "An act respecting the Consolidated Statutes for Upper Canada," fully warrant and justify such a construction. It also accords better with the practice of the court, and will harmonize with all decisions applicable to the mode of dealing with interrogatories propounded in the course of any pending legal proceedings.

Rule discharged, with costs.

WALLIS V. HARPER AND GIBSON.

Insolvent debtor—Application for discharge—What objections available—Change in the law under Consol. Stats. U. C., ch. 26, secs. 7, 8, 11, 13.

The provisions of 5 W. IV., ch. 3, sec. 6, not having been re-enacted in the Consolidated Acts the law has been changed, and the debtor is now entitled to his discharge if he gives the information called for by interrogatories or examination *viva voce*, and it appears that he is not worth \$20 exclusive of the articles exempted, unless his case is brought within the provisions of Consol. Stats. U. C., ch. 26, sec. 11.

In this case it appeared to the learned judge, as the result of interrogatories and examination *viva voce*: 1. That when the debtor, G., endorsed the note on which the plaintiff's judgment was recovered, he knew himself to be insolvent, but that he endorsed only for the accommodation of one H., whose solvency at the time he was not shewn to have had any doubt of. 2. That G. had permitted this same H. to obtain judgment against him for a much larger sum than he owed him, but that, though his conduct in this had not been satisfactory, his estate had not been injured by it, nothing having been recovered on the judgment. 3. That G. had placed a large sum in the hands of G. R. and H., and allowed it to remain there bearing only six per cent. interest, while he was raising money by discounts at the rate of about thirty-six per cent., and that after the plaintiff's judgment had been obtained he arranged to let them apply this sum to take up notes on which they were endorsers after him. 4. That G.'s account of the manner in which he had been paid certain debts due to him by his relations was not satisfactory. 5. That the account given by him of his bill transactions afforded no ground for believing that he had more than \$20 in his possession or under his control. 6. That his conduct in permitting H. to get the judgment above mentioned, in giving H. a mortgage on all his real property to secure him against endorsements, and in afterwards, only a short time before his examination, when he was hopelessly insolvent, signing a composition with H. by which he released H. from all liability, was very reprehensible; but that this misconduct had in no way been of benefit to the defendant or seriously injured his estate, for G. R. and H. had become insolvent, the judgment in favour of H. could be reduced to its proper amount, and the release to him and arrangement with G. & Co., if fraudulent as against creditors, could be set aside by them. 7. That the account given by G. in the *viva voce* examination of the manner in which he had disposed of his property was by no means satisfactory, but it was not shewn by it that he had any means of satisfying the plaintiff's claim.

Held, that under these circumstances the case was not within any of the provisions in sec. 11, of Consol. Stats. U. C., ch. 26, and that the debtor must be discharged, though under the former law upon the facts stated in No. 3 he would have been detained.

It was made a condition that he should assign to the plaintiff any claim against his relations mentioned in No. 4, so that the plaintiff might contest the payment if he thought proper.

[CHAMBERS, July, 1862.]

The defendant, John Gibson, was a prisoner admitted to bail, having been arrested on a writ of *capias ad satisfaciendum* issued in this case. He applied to be discharged from custody on the ground that he was not worth twenty dollars, exclusive of his necessary wearing apparel, beds and bedding

of himself and family, stove, cooking utensils, implements of trade, not exceeding in value sixty dollars, and that he had answered all interrogatories administered by the plaintiff, and that he had submitted himself to be examined pursuant to a judge's order.

The plaintiff contended that he was not entitled to his discharge, on the following grounds:

That the answers to interrogatories and examination viva voce shewed that at the time he contracted the debt for which this action was brought—namely, endorsing the note of the other defendant, John Harper, for \$800—he was in insolvent circumstances, having made a mortgage to Harper covering his real property, which was not of sufficient value to pay all the notes which Harper had endorsed for him, and the amount that he was otherwise indebted to Harper: that he thus wilfully contracted a debt without having had a “reasonable assurance of being able to pay or discharge the same,” and therefore he was not entitled to his discharge.

2. That he fraudulently and collusively permitted John Harper to recover a judgment against him for a much larger amount than he owed Harper: that this was done either to allow Harper to recover more than he was entitled to, to enable him to retain the same for his, defendant's, benefit, or to favour plaintiff at the expense of the rest of the creditors, by allowing him to apply the sum he so recovered to indemnify himself against notes he had endorsed for defendant; and in this view the matter of his answers “ought not to be deemed satisfactory,” so as to authorize his being discharged.

3. That he placed a large sum of money in the hands of Gill-yatt, Robinson, and Hall, and, instead of applying this money to the payment of his notes when they became due, he renewed such notes, paying interest and commission at the rate generally of 36 per cent. per annum; and just at the time he was about to be orally examined touching his debts and effects, he arranged with G. R. & H. that they should apply these moneys to the payment of certain notes of which he was either maker or prior endorser to them, and which they had endorsed for his benefit:—that he intended either to allow G. R. &

H. to hold this money for his benefit away from his creditors, or to place such moneys in their hands to give them a fraudulent preference over his other creditors; and that this should prevent him from getting his discharge, particularly as he had made the disposition of the money after judgment was recovered against him in this matter.

4. That the statements made by him and the entries in his books relative to his demands against his father-in-law, his brother-in-law, and his nephew, were not such as to impress one favourably towards the defendant: that the mode in which he accounted for receiving payment of the several demands which it appeared he had against them was not satisfactory, and ought to prevent his discharge.

5. That his account of his affairs, as appeared from his own statements as to the property he had when he retired from business, and the means he now has of paying his debts, and the amounts he had paid out since retiring from business, did not satisfactorily shew that he had not now in his hands or under his control property or money out of which he could pay this demand, or some part of it, if he felt so disposed.

6. That taking his own statement of his transactions, and putting the most favourable construction on his actions, his conduct deserved severe reprehension:—instead of assigning his property to disinterested parties to pay his debts generally, he had allowed fraudulent judgments to be obtained against him, and so far as he could he had placed his property and means of satisfying his debts beyond the reach of his general creditors, and had put it in a position to be of benefit only to a few favourite creditors, probably in the hope that eventually these parties would either give him back some of the money or property that he had thus been the means of unfairly placing in their hands, or that they would assist him in business after he had got through with his present difficulties:—that he ought not to be discharged in this matter in the exercise of a sound discretion.

RICHARDS, J.—The law applicable to the subject is contained in chapter 26 of the Consol. Stats. of U. C., Secs. 7, 8,

11 & 13, and for the purposes of the application now under consideration may be referred to as follows:—

Section 7 provides, that in case any debtor confined in close custody in execution gives a notice that he will, after the expiration of ten days, apply to be discharged from custody, “the plaintiff, at whose suit he is confined, may file interrogatories for the purpose of discovering any property or effects which such debtor may be possessed of or entitled to, or which may be in the possession or under the control of some other person for the use or benefit of such debtor, or which such debtor, having been in possession of, may have fraudulently disposed of to injure his creditor, and touching such debtor’s estate and effects, and the circumstances under which he contracted the debts or incurred the liability which was the subject of the action in which judgment has been rendered against him, and as to the means and expectations such debtor then had, and as to the property and means he still hath, and as to the disposal he may have made of any of his property; and may serve a copy of such interrogatories on such debtor; or the plaintiff, at his option, may cause such debtor to be examined *viva voce* upon oath before the judge of the county court in the county in which such debtor is confined, or before some one to be appointed in that behalf by such county judge, upon and touching all or any of the matters aforesaid.”

Section 8.—After the expiration of ten days and service of the notice, &c., upon the debtor’s making affidavit that he is not worth twenty dollars exclusive of bed and bedding, wearing apparel, &c., and that he hath answered all interrogatories filed by the plaintiff, and that he has submitted himself to be examined pursuant to the order of the judge, such debtor may apply to a judge for a summons to shew cause why he should not be discharged from custody, and upon the return of such summons, and where there are interrogatories if the answers thereto are deemed sufficient by such judge, or where such examination has taken place if the matter thereof be deemed satisfactory by such judge, such debtor shall be by order discharged from custody, and such discharge shall

have the same and no other effect as a discharge for non-payment of weekly allowance (with, according to section 2, shall not be a release or satisfaction of the judgment, or other debt or demand, nor shall such discharge deprive the plaintiff of any remedy against the lands or goods of such debtor.)

Section 11 directs, that in case it appear to the judge that the debt for which the debtor is confined was contracted by any manner of fraud or breach of trust, or under false pretences, or that such debtor wilfully contracted such debt or incurred such liability without having had at the same time a reasonable assurance of being able to pay or discharge the same, or that he is confined by reason of any judgment in an action for breach of promise of marriage, seduction, criminal conversation, libel or slander, the judge may order the applicant to be re-committed to close custody for any period not exceeding twelve months, and to be then discharged.

By section 13 a person arrested under a writ of *capias ad satisfaciendum*, though he was not confined to close custody, but has given bail, may apply for and obtain his discharge in the same manner, and subject to the same terms and conditions, as nearly as may be, as an execution debtor who is confined to close custody.

I find it exceedingly difficult to come to a satisfactory conclusion as to the proper mode of disposing of cases that arise under this statute. All that the debtor is required to state to entitle him *prima facie* to his discharge is, that he is not worth twenty dollars exclusive of certain specified articles, and that he has answered all interrogatories, and has submitted himself to be examined pursuant to the order of a judge when such order has been obtained. Then, if the judge to whom the application is made deems the answers to the interrogatories sufficient, or where there has been a *viva voce* examination deems the matter thereof satisfactory, then the debtor is to be discharged. Then there is the further enactment, by section 11, that if the debt was contracted by any manner of fraud or breach of trust, or under false pretences, or if the debtor wilfully contracted the debt without having at the time a reasonable assurance of being able to pay the same, or if the

judgment is for breach of promise of marriage, seduction, criminal conversation, libel or slander, the judge is to order the defendant to be re-committed to close custody for any period not exceeding twelve months, and then to be discharged.

What then is to be deemed sufficiently answering interrogatories? I think if the defendant gives the information called for by the interrogatories that will be considered as sufficiently answering them, and it seems to me when the examination is *viva voce*, "the matter thereof being deemed satisfactory" means in effect the same thing, the form of expression merely varying to meet the different mode of examination.

If, then, it sufficiently appears from the answers to the interrogatories or the *viva voce* examination that the defendant is not worth twenty dollars beyond the value of the excepted articles that he is allowed to retain, he must be discharged, unless the facts shewn bring his case within the provisions of the eleventh section of the statute.

I am not prepared to say that the facts of this case bring it within any of the provisions of the eleventh section of the act. Probably the most convenient manner of disposing of the case, and expressing my views on it, will be by taking up the objections urged by the plaintiff to defendant's discharge *seriatim*.

The first objection in effect is, that at the time he endorsed the note for John Harper on which the judgment is recovered defendant knew he was insolvent, and had mortgaged all his available real property to Harper to secure him against the endorsement of certain notes for him; and at that time his debts exceeded the value of his property, and he therefore incurred the liability without a reasonable assurance of being able to pay or discharge the same. The answer urged to this on defendant's behalf is, that he merely endorsed the note for Harper's accommodation, that he did not negotiate it himself, and at the time he endorsed it he believed Harper was able to take it up. I fail to see anything in the papers placed before me to induce me to believe that defendant doubted Harper's

solvency until after this note was endorsed, and I am not prepared to say that this ground can be sustained.

As to the second objection, I think the facts substantially sustain the objection, and that defendant did permit Harper to obtain a judgment against him for a much larger amount than he was entitled to, and I cannot say that this was done for any honest purpose. I fail to see, however, that anything has been got from defendant's estate under this judgment, and though he may have intended that it should have been used to injure or defraud his creditors, I cannot say that the allowing Harper to obtain the judgment has had that effect; and though defendant's conduct has not been satisfactory, I do not see that I am at liberty to refuse to discharge him on this ground.

As to the third objection—I think the same is substantially shewn to be true—that defendant did place a large sum of money in the hands of Gillyatt, Robinson, and Hall, and allow it to remain there at a rate of six per cent. for interest on it, whilst he was getting notes discounted at a rate which compelled him to pay as much as 36 per cent. per annum for some of the money so raised; and that he arranged after the judgment was obtained against him in this cause, to allow G. R. & H. to apply the moneys so placed in their hands to take up notes on which they were endorsers after the defendant. The transaction is far from being satisfactory, and if the law stood as it did at the time judgment was given in *Aitkin and Bullock v. Pentland*, (11 U. C. R. 19), I should refuse to discharge the defendant. But the sixth section of 5 Wm. IV., ch. 3, is not in any way introduced into our statute as it now stands, and though a defendant may be interrogated as “to property or effects that he may have fraudulently disposed of to injure his creditor,” yet it is not provided that the perpetration of such fraud shall prevent his being discharged from custody, nor is it requisite that he should swear that since judgment was rendered against him he has not made any disposition or conveyance of his property or effects, in order to defeat the remedy under the judgment, as

was necessary under the sixth section of the statute of 5 Wm. IV., already referred to.

As to the fourth objection, I cannot say that the account that defendant has given as to the mode in which he was paid the amount due to him by his father-in-law, by his brother-in-law, and by his nephew, is so "satisfactory" that I should consider these accounts as finally closed between the parties; and if the plaintiff wishes it I will make it a condition of defendant's discharge that he convey to the plaintiff any right or interest he may have in these demands, to enable the plaintiff to test the validity of the settlements referred to, if he should be so advised.

As to the fifth objection—The final statement made up and put in on behalf of defendant gives a much more reasonable account of his "bill transactions" than what appeared originally, and I can understand how a man who did not keep a correct and rigid account of every bill transaction, and of all his expenditures, may fail to give a satisfactory account of what he has done with the money he has received during a series of years. I cannot say there is such a discrepancy between his receipts and expenditures as leads me to suppose that he has more than five pounds worth of money or property beyond the amount allowed him by law; or that any one else has property or money to a larger amount in trust for him. When a man's circumstances become so desperate that he is obliged to raise money at the rate of 36 per cent. per annum, it is not surprising that in the end his assets should amount to nothing.

As to the sixth objection—If I could properly refuse to discharge defendant on the grounds suggested in this objection, I should certainly not grant an immediate discharge. I think his conduct in relation to the permitting Harper to obtain the judgment for so large an amount beyond what he was entitled to, and giving him a mortgage on all his real property to cover Harper's endorsements on his account, very reprehensible; but, in addition to this, after Harper became insolvent, and if I recollect right but a short time before he, defendant, was examined in this cause, he signed Harper's

composition deed, thereby discharging him from any liability that might arise under any of the many transactions between them, and all this when he knew he was hopelessly insolvent. He had no right as an honest man to place his effects in a way to prejudice the interest of his creditors after he knew that he and Harper both were insolvent, and his conduct in this respect shews that he was more desirous of furthering the interests of Harper than he was of giving satisfaction to his creditors. The arrangement that he made with Gillyatt, Robinson, & Hall, was of a similar character, and would call for similar observations.

I cannot say that these arrangements have in any way operated to the benefit of the defendant, whatever may have been his intention, for Harper & G., R. & H. having both become insolvent, they are in no position to aid him. Nor can I say that the transactions referred to have really to any serious extent injured the estate of defendant. The fraudulent judgment can be reduced to the proper amount, and if the mortgage and release to Harper are fraudulent and void as against creditors I suppose the property encumbered by the mortgage may be made available to satisfy defendant's debts, and if the arrangement with G., R. & H. is also fraudulent and void as against creditors, the demand against them, if worth anything, may also be reached by proceedings on behalf of creditors.

I have gone over defendant's *viva voce* examination, which consists of some 160 pages. The information contained in it is of very little value to the plaintiff, and certainly the account which he gives of the way in which he has disposed of his property and effects is by no means "satisfactory;" but, as I have already stated, I cannot say that he has the means in his power or under his control of paying any portion of the plaintiff's claim beyond the effects which he is allowed to retain by law.

I do not see that his case comes within any of the provisions of the eleventh section of the statute, and I am therefore in my view of the law compelled to discharge him. If I should refuse to make the order in his favour on the ground

that I was not satisfied with his conduct, and he were in prison, I no not see how he could ever be discharged: his imprisonment would in fact be perpetual. I could not order him to be imprisoned for a year, or any lesser period, as I might do if the debt were contracted by means of fraud, breach of trust, or false pretences. I cannot believe the legislature intended he should suffer more severely for improperly conducting himself after the debt was contracted than if he had been guilty of actual fraud in the contracting of the debt. If he had fraudulently disposed of his property, and refused fully to disclose or answer, I might commit him until he satisfactorily answered; and if the answers disclosed fraudulent transfers of property as against creditors, the creditors might take steps to recover the property; or, if the debtor had money which he had no right to retain, I incline to the opinion that I could refuse to discharge him until he gave up the money, because in his affidavit on which his application is founded he must shew he is not worth twenty dollars over and above certain effects which the law allows him.

If it is doubtful as to his having claims of some value to certain effects, which his creditor values, but which he may consider of no value, I am at liberty to make it a consideration of his discharge that he assign to the creditor any claim he may be presumed to have in such property or effects. But when I am satisfied that he has not the means of paying the debt, though he may have improperly disposed of some of the means of doing so, and when he has fully answered, I do not think I can refuse the order, his case not coming within the eleventh section of the statute.

I take it that under the 13th section I must dispose of this case precisely on the same terms as if the defendant was confined in close custody in prison on the writ of *capias ad satisfaciendum* in this cause.

I think there has been a change made in the law by the repeal of the statute 5 Wm. IV.: that such change was made advisedly; and that the view I have already expressed is what the legislature intended by the law as it now stands.

Order for defendant's discharge, on condition of his assigning his claims against his father-in-law, his brother-in-law, and his nephew, to the plaintiff, if he should desire it.

CLIFTON v. DURAND.

To obtain an order for execution under Consol. Stats. U. C., ch. 24, sec. 19, the service of the summons must be personal, or leave must be obtained to make it in some other manner.

[CHAMBERS, July, 1860.]

The plaintiff being entitled to demand and receive a sum of £2 14s. 10d. from the defendant, for costs, by reason of defendant's bill when taxed being reduced by one sixth, applied on the 20th of July, for a judge's summons, calling on the defendant to shew cause next day why he should not pay the money. When the clerk went to the defendant's office to serve the summons, he found it shut up, with a notice on the door that Mr. Durand was in the country, but would be at home on the Monday after, which would be the 23rd of July. The clerk then proceeded to Mr. Durand's dwelling-house, and was answered that Mr. Durand was not at home, and he then served a daughter of Mr. Durand's with the copy of the summons. The affidavit of service did not state the age or probable age of the daughter. On the Saturday (next day) the plaintiff obtained an order for judgment on such service, which it appeared was not enquired into.

This proceeding was under the 19th section of Consol. Stats. U. C., ch. 24.

On the 23rd of July, Mr. Durand obtained a summons calling on the plaintiff to shew cause why the order made on the 21st should not be rescinded, on the ground of the insufficiency of the service of the summons.

He urged, first, that summonses of this description should be served personally; and secondly, if they may be served on a member of defendant's family, then the affidavit in this case should shew that the person upon whom the service was made was a person capable of understanding what to do with the paper.

BURNS, J.—I think Mr. Durand is right upon the first point, and that a proceeding upon which there is to be final judgment should be either served personally, or the court or a judge should be applied to for the purpose of allowing

service to be made otherwise than personal. The former mode of proceeding by attachment for non-payment of money or costs directed to be paid required personal service before an attachment could be ordered. In the ordinary proceeding of a summons for a debt, no judgment can be entered without personal service of the writ of summons, unless the court interpose directing how service should be made.

There is no reason why personal service should have been dispensed with in this case. Mr. Durand had only gone to the country for a day or two, and was in town again on the Monday morning.

The following cases upon the English Act, 1 & 2 Vic., ch. 110, allowing judgments to be entered and execution to issue on orders for payment of money, clearly shew that the service must be personal, or at least the court must be applied to for an order dispensing with it: *Jordan v. Berwick*, (1 Dowl. N. S. 271), *Wilson v. Foster* (1 D. & L. 496), *Doe v. Amey* (1 Dowl. N. S. 23), *Winwood v. Holt* (3 D. & L. 87).

The order for judgment must therefore be rescinded.

BOWERS ET AL V. FLOWER.

*Order to arrest—Application to review—22 Vic. ch. 96, sec. 2—
Consol. Stats. U. C. ch. 24, sec. 25.*

In this case, on application to the county court judge for an order to hold to bail under 22 Vic., ch. 96, the plaintiffs relied upon the facts that defendant had frequently promised but failed to pay the debt, and on one occasion had told the plaintiff to get it if he could; and that since the commencement of this suit defendant had parted with some of his property, and had advertised the remainder to be sold by auction—adding a statement that deponent had good and probable cause for believing that defendant unless forthwith arrested was about to quit Canada with intent to defraud the plaintiffs. An order having been thereupon granted, defendant obtained a summons from the same judge to rescind it, on affidavit denying the debt, and shewing that his intention was only to remove his family to Lower Canada, for the purpose of carrying on a large railway contract which he had taken there some time before. In answer, the plaintiffs again asserted the debt, and stated rumours as to defendant's intention to sell out his contract, and their fears that the place he was going to in Lower Canada being close to the line, he would move across into the States, &c. The summons having being discharged, on application to a judge in chambers to review this decision.

Held, that defendant must be discharged; that the denial of the debt alone would not be sufficient, though the facts and circumstances relating to the claim might be important to consider as affecting the probability of his absconding; but that an apprehension of his leaving at some future period could not warrant the arrest, for the judge must be satisfied that he is about to leave unless forthwith apprehended, that is, to leave forthwith.

Held, also, that defendant by putting in special bail after having given a bond to the sheriff, had not precluded himself from making this application.

The order to arrest and subsequent proceedings were set aside without costs.

[CHAMBERS, 11th March, 1859.]

Richards, Q.C., for the defendant, during Hilary term last, obtained a rule calling upon the plaintiffs to shew cause why the defendant should not be discharged from custody under the writ of ca. re. issued in this cause; and why the bond given to the sheriff should not be given up to be cancelled, and the bail-piece or recognizance entered into be taken off the files; or why the order of the judge of the county court, dated the 27th of January, should not be varied, discharged, or set aside, &c.

When the rule nisi was moved absolute, it was agreed between the parties that it might be heard and disposed of by a judge in chambers.

The suit, it appeared, was commenced originally by writ of summons, issued on the 11th October, 1858, with which defendant was served. On the 18th of December one of the

plaintiffs made an affidavit to hold the defendant to bail, swearing to a debt due to the plaintiffs, amounting to the sum of £2,542. The defendant was described as of the town of Berlin, in the county of Waterloo, contractor. The grounds made for asking a judge to grant an order to arrest were, that since the defendant was served with the writ of summons he had parted with the greater part of his property, and the remainder he had advertised to be sold at public auction on Tuesday, the 21st of December, and that he intended leaving this country immediately after said sale; and that the deponent had good and probable cause for believing that the defendant, unless forthwith arrested, was about to quit Canada with intent to defraud the plaintiffs.

On the 20th of December the judge of the county court of Waterloo, under secs. 2 & 10 of 22 Vic., ch. 96, made an order that within ten days the plaintiffs might issue one or more writs of *capias* against the defendant, to hold him to bail in £2,000.

The defendant was arrested on the 21st of December, and gave a bail-bond to the sheriff at first, and on the 28th of December put in special bail. On the 20th of January, W. H. Bowlby, for the defendant, obtained a summons from the judge of the county court, under the provisions of the 8th and 10th sections of the act, to obtain a discharge from the arrest.

The defendant made affidavit denying any debt whatever being due to the plaintiffs. It seemed they were brothers-in-law, and the defendant had purchased a farm from the plaintiffs, and had paid a considerable portion of the purchase money, and given a mortgage to secure the remainder, amounting to a large sum. They afterwards entered into an arrangement between themselves with respect to the mortgage transactions. The mortgage certainly was discharged, but the terms upon which this was done was the dispute between them. The plaintiffs contended that the debt or money was still to be paid and agreed to be by the defendant, while, on the other hand, the defendant contended that the money he had already paid was fully equivalent to the value of the property, and that the plaintiffs were content with

that, and his word of honour that if more could be made from the property, or if defendant could raise money upon it, then it was to be optional with him to pay the plaintiffs more or not, as he might be able to do.

The defendant swore that on the 23rd of September, 1857, he entered into a contract solely, in his own name, for the construction of the Stanstead, Shefford and Chambly Railway, in Lower Canada, some 80 miles in length, to be finished by the 1st of June, 1861, at a cost of \$1,920,000, and of which about one-quarter was then finished: that he left his family living upon his farm near Berlin, while he himself was in Lower Canada attending to the construction of the railway: that he found it inconvenient to be living away from his family, and he resolved to sell off the stock, &c., upon the farm, and remove his family to Lower Canada, near the works he was engaged upon; that at first he thought of doing so during last summer, but at length concluded to do so when the winter set in; and that he arrived in Berlin on the 18th of December, for the purpose of selling off his stock, and then removing his family to Lower Canada, near where his work was. He denied that he ever intended leaving Canada or this part of the province with any other view, or for any purpose other than to prosecute his work.

The reason why the application was delayed until the 20th of January in being made was, as defendant's attorney swore, that he deemed it prudent to procure from Lower Canada affidavits of the truth of the defendant's statements as to his engagement upon the railway, and the magnitude of the work, and his standing there. The defendant's statements were confirmed by affidavits of the president and one of the directors of the railway; and it appeared that the defendant had rented a house in St. John's, Lower Canada, from the 1st of December, in order to remove his family into, and he had since moved his family there. Affidavits of persons living in Berlin, near which place the plaintiffs also lived, stated that the plaintiffs could not be otherwise than aware that the defendant had this contract in Lower Canada, and that he was only intending to move his family there: that on the 23rd of March, 1858, the plaintiffs and defendant

met in presence of the registrar of the county, and the plaintiffs released the mortgage mentioned. The sale of the defendant's property was stated to be of such things as he could not conveniently move with his family, and the sale amounted to some \$300 cash, and upon credit to the amount of \$2,000, for which notes were taken, payable twelve months after date, and these notes had been left with a friend of the defendant at Berlin for collection.

The application was resisted, on affidavits containing a history of the defendant's original indebtedness for a large sum of money, as the price of the farm, of which the plaintiffs contended the amount arrested for was the balance, notwithstanding the release of the mortgage. The plaintiffs did not deny that they were aware of the defendant's engagement as a contractor of the railway, and one of them said that defendant's wife told him they intended to make the farm their home, and should only go to Lower Canada upon a visit. They said they heard rumours of the defendant intending to leave Canada, and that he was going to sell out his contract upon the road; that the place he was going to was only six miles from the United States boundary, and the defendant might at any time move across the line. One other person said he heard rumours that the defendant was about to run away, and another said he would also have arrested defendant if indebted to him.

On these affidavits the judge of the county court discharged the summons which he had granted.

The defendant, in now making the application to this court, filed an affidavit, of a person living at Berlin, who said that he was well acquainted with the plaintiffs, defendant, and everybody living in and about Berlin, and that he never heard of any such rumour as the defendant being about to quit Canada, and was positive there were no such reports in circulation: that it was quite well known there that the defendant was engaged upon the railway, and was making arrangements to take his family to Lower Canada: and that if defendant was minded to remove to the United States, the facilities of the railway from Berlin would enable him

to accomplish it much easier than from the place in Lower Canada where he intended to live.

BURNS, J.—Since the statute 22 Vic., ch. 96, it will no longer do to swear merely to the belief of the deponent that the defendant is about immediately to leave the province, and for the purpose of fraudulently preventing the recovery of the debt. The second section says the party shall by affidavit shew such facts and circumstances as shall satisfy a judge that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally or the plaintiff in particular. It is impossible to lay down any rule as to what facts and circumstances will be thought sufficient, for one mind may be satisfied with certain facts and circumstances, which another would think afforded no evidence of the intent to quit Canada to defraud creditors. I take it to be clear, however, that the intention of the legislature was, that the judge to whom the application should be made should have such facts and circumstances laid before him upon affidavit, that would be *prima facie* evidence from which he might draw the inference that the debtor was about to quit Canada with the intent to defraud. It is not the creditor's belief or the inferences he may choose to draw or swear to that will be sufficient, but the person applying for the arrest must adduce such facts and circumstances as convince the judge of the truth of the belief.

On reading the affidavit of the plaintiff to hold to bail, there are only these facts stated from which the inference is to be drawn,—1st. That the defendant frequently promised to pay the debt, but did not do so, and when the plaintiff went to him on one occasion in respect of it, the defendant told him to get the money if he could.

2nd. That on the 11th of October, 1858, the suit was commenced by summons, and since that time the defendant parted with some of his property and advertised other part to be sold at public auction on the 21st of December.

These are all the facts and circumstances laid before the judge to arrive at the same conclusion the plaintiff did when

he added to his affidavit that he had good and probable cause for believing that the defendant, unless forthwith arrested, was about to quit Canada with intent to defraud the plaintiffs.

I do not think I should have drawn such an inference from those two facts alone, but that is not the question now. The judge of the county court thought these facts sufficient in his judgment to order the arrest of defendant. Afterwards the defendant applied under the eighth section to the judge of the county court for relief against the order for the arrest. The ground for this was, first, that the defendant denied any debt due or any promise to pay it; and secondly, that his selling his property was consistent with his occupation and business in Lower Canada, and that it was not just or right to him to draw the inference that he was about to quit Canada with intent to defraud the plaintiffs.

With regard to the first, I agree that the judge of the county court could not allow the denial of any debt being due as a reason for influencing his mind, for he could not assume the office of trying upon these affidavits whether the plaintiffs' statements in that respect were true or not, inasmuch as they are contradictory to each other. It is, however a circumstance to be considered in dealing with the question of probability or improbability of a person absconding to avoid payment of a debt, to know what persons other than the parties themselves can tell us with respect to the fact whether in truth there be any debt due or not. Putting out of the question the defendant's denial of a debt being due, it is important to look at the facts and circumstances stated by those who were cognizant of them, in order to judge whether it be likely that the defendant really did intend to abscond.

The second ground made by the defendant I take it does establish clearly enough that the selling off his farm stock and property at Berlin was to enable him to remove his family to Lower Canada, there to carry on his contract on the railway with more convenience and advantage to him-

self, and that any inference to be drawn from the fact of selling his stock, &c., is rebutted. I should say, from reading the plaintiffs' affidavits, they themselves feel that to be so, for they put their justification for causing the arrest on the ground that the defendant may sell out his contract on the railway and remove to the Northern States. Perhaps it is possible enough that the plaintiffs' fears in that respect may ultimately be realised from circumstances which we do not and cannot foresee. That however is no reason that a plaintiff should take this course. The facts and circumstances which are to convince the judge in the first instance are to be to the effect that the defendant is about to quit Canada with the intent mentioned, unless the party be forthwith apprehended. The object of the eighth section was, that such order for the writ might afterwards be reviewed. An apprehension that something might take place at some future period which would cause a person to quit Canada with such intent will not warrant a present application, that he is about to quit with such intent. The expression forthwith apprehended shews what the legislature meant by the use of the other, about to quit Canada.

The conclusion I have arrived at is, that the judge of the county court would have exercised a sound discretion in ordering this arrest to be set aside, but he seems to have thought the better course was that he should discharge his summons, and leave the defendant to move this court (as he may do if nothing has occurred to prevent it) under the provisions of the eighth section.

The plaintiffs urge that the defendant, by putting in special bail after having giving a bond to the sheriff, has precluded himself from making this application. I do not think he has. The reason why he did not earlier apply to the judge of the county court to rescind the first order was his desire to procure affidavits from Lower Canada, a very natural thing for him to do. Payment of money as a deposit in lieu of bail does not preclude the application being made. The application is one to rescind a judge's order, and does not depend on other steps taken in the cause which may waive the right. The eighth section of the act says

that the application may be made at any time after the arrest.

This section is precisely similar to the sixth section of the English act, 1 & 2 Vic. ch. 110, and therefore all the decisions upon that act are applicable to our act. I observe the more recent decisions hold that the court has power to enter into the enquiry whether a debt be due or not to the plaintiff, and if it clearly appears beyond doubt that the plaintiff's claim is wholly unfounded, the court will interfere and order the arrest to be set aside, on the principle that the court has unlimited power over its own process and will not see it abused.

I refer to these cases as bearing upon this case generally: *Walker v. Lamb* (9 Dowl. 131), *Gibbons v. Spalding* (11 M. & W. 173), *Graham v. Sandrinelli*, and *Talbot v. Bulkeley* (16 M. & W. 191, 193), *Bullock v. Jenkins* (20 L. J. Q. B. 90), *Copeland v. Child* (22 L. J. Q. B. 279), *Pegler v. Hislop* (1 Ex. 437), *Burness v. Guiranovich* (4 Ex. 520), and *Stammers v. Hughes* (18 C. B. 527).

The judge's order discharging his summons, together with the original order for the arrest, must be rescinded, and the defendant ordered to be discharged from custody, and the bail bond given to the sheriff ordered to be given up to be cancelled, and the recognizance of bail directed to be taken off the files of the court.

The judge of the county court ordered the costs to be costs in the cause, but I think the proper order to make now, in setting aside the first order for the arrest and the subsequent steps taken thereon, is that it shall be done without costs to either party.

WATSON V. GARRETT ET AL.

Arbitration—Costs—Rule of Court No. 155.

A cause was referred before trial by judge's order, costs to abide the event, and the arbitrator awarded £9 3s. 9d., the claim, which was originally of the jurisdiction of the county court, having been reduced by set-off. The plaintiff applied for full costs, on affidavit shewing that he intended to enforce his award by rule of court and execution under Consol. Stats., U. C., ch. 24, sec. 19.

Held, that he must be considered as obtaining a final judgment, and the case came within the rule of the court No. 155; for under the statute above mentioned the proper mode of proceeding is to enter a judgment, and at all events, as the more convenient course for the plaintiff would be to enforce the award under C. L. P. A., sec. 84, the court would not enable him to take advantage of the other method merely to evade the rule and obtain full costs.

Semble, that the court, when applied to for a rule to pay over money awarded under the statute first mentioned, will exercise the same discretion as formerly on motion for attachment, for which this remedy is now substituted.

Where a cause is referred, costs to abide the event, the plaintiff is not entitled to full costs if he is awarded anything, but to such costs only as he could have claimed if he had recovered the same amount.

[CHAMBERS, 6th July, 1860.]

Summons calling on the defendants to shew cause why full superior court costs should not be taxed to the plaintiff, or why such other costs should not be taxed as to the presiding judge should seem fit, on the ground that the action was a proper one to be brought in the superior court or in the inferior jurisdiction of that court; that on the reference of the cause to arbitration it was directed that the costs should abide the event, which was in favour of the plaintiff; and that the reference was compulsory.

The plaintiff declared against the defendants for the value goods sold by them for him under a del credere commission, and on the common counts and accounts stated. The defendants pleaded non-assumpsit, payment, and set-off.

The plaintiff failed before the arbitrator to shew that the defendants were bound to guaranty the payment of the goods sold by them, but proved by the oath of the defendants that they owed him on the account stated £19 5s. 1d., on the 7th of June, 1856, and further items of money received by the defendants to the plaintiff's use to the extent of £29 18s. 9d. received since the said 7th day of June: that these moneys were received by the defend-

ants from the proceeds of goods which they had sold on commission for the plaintiff, and no account had been furnished to the plaintiff since the said 7th of June. Defendants proved charges against the plaintiff for commission, freight and storage, which reduced the plaintiff's claim to the sum awarded him, £9 3s. 9d.

The cause was referred on the 4th of June, 1859, by order of Mr. Justice McLan to the county judge of the county of Wentworth, with the direction that the costs of the action, the application to refer, and of the reference, should abide the event. The order was made on a summons, which was served on the defendants, and no cause shewn against it.

The arbitrator made his award on the 24th of January, 1860, and found against the plaintiff on the issue as to goods sold under a *del credere* commission, and for him on the other issues. He found expressly that the defendants had not satisfied the plaintiff's claim by payment.

The plaintiff wished to enforce the award and applied to the deputy clerk of the Crown at Hamilton, and requested the taxation of the costs "for the purpose of thereon proceeding to enforce the award by execution on the rule of court in that behalf." The clerk refused to tax full costs, and thereupon this application was made.

The plaintiff referred to *Wigens v. Cook*, 28 L. J. C. B. 312; S. C. 38 Law Times Rep. 224; *Archbold's Practice* 450. Rules of the Superior Courts of Common Law Nos. 155, 168; *Griffith v. Thomas*, 4 D. & L. 109; *Jones v. Jones*, 29 L. J. C. B. 151. He contended that the judge in making the order had directed that the costs should abide the event, and the event meant that which entitles the plaintiff to judgment in the cause: that on the finding of the arbitrator the plaintiff was entitled to judgment in the cause, and by the terms of the judge's order, which must be viewed as the submission, he was entitled to the costs. If this view were not taken, he then contended that none of the statutes referred to deprived the plaintiff of his costs, for they contemplated a trial at which the judge might certify, and as there was no trial these provisions did not apply to this case.

As to the 155th rule, he contended that it did not apply, for the plaintiff only wished to enforce the award by a rule of court directing the payment of the sum awarded and the costs: he did not intend to obtain final judgment without a trial.

For the defendant it was urged that the section of the Consolidated Statutes which referred to this subject (Consol. Stats. U. C., ch. 22, sec. 328) declared that where a suit of the proper competence of the inferior courts should be brought in the superior court, the defendant should be liable to inferior court costs only. that this legislative enactment was general, and applied to all cases of the proper competence of the inferior courts, and the only mode by which the plaintiff could get full costs was by the certificate of the judge who tried the cause; and if, therefore, the plaintiff took a course whereby it became necessary for him to tax his costs without a trial, so that he could not get the certificate referred to in the statute, that was his own fault, and he would not be entitled to costs at all. But if this view were not concurred in, then it was argued that the rule of court No. 155, making it necessary to get a judge's order for full costs, was in fact carrying out the previous legislative provisions in that respect, for though the amount recovered might be *prima facie* within the jurisdiction of the inferior court, yet by shewing it was not so in fact the plaintiff obtained the necessary order for full costs: that the facts shewn in this case established that this action was of the proper competence of the county court, and therefore the plaintiff was not entitled to a certificate: that the affidavit filed shewed the plaintiff intended to enforce the award by judgment and execution under the rule of court, or rather that he intended to issue the execution No. 40, of the appendix framed under the rules of court, and consequently was not entitled to full costs. He further contended that under the 84th section of the Common Law Procedure Act, the proper mode of enforcing the award was by the same process as the finding of a jury upon the matter referred; that under this section the plaintiff ought not to be permitted to enforce the award by attachment: that his only

object in doing so would be to get full costs, when it was not intended by the statute and rule of court that he should have them.

For the plaintiff it was urged in reply that a reference under the statute, particularly when, as in this case, the defendant did not object to it, must be considered the same as a reference by consent; and as the reference stated that the costs were to abide the event (the event meaning when the plaintiff was entitled to a judgment from the finding of the arbitrator), such event being in the plaintiff's favour, he was by consent entitled to full costs: that the plaintiff was entitled to costs under the statute of Gloucester, and the provisions in the revised statute shewed that when there was a trial the plaintiff should not have costs unless the judge certified, consequently it did not apply here: that the rule of court ought not to prevail when by the consent of defendant the plaintiff was entitled to costs, and particularly in this case, where the plaintiff intended to proceed as under an attachment.

RICHARDS, J.—By Consol. Stats. U. C., ch. 22, sec. 328, it is provided that in case a suit of the proper competence of a county court be brought in either of the superior courts of common law, or in case a suit of the proper competence of a division court be brought in either of such superior courts, or in a county court, the defendant shall be liable to county or division court costs only (as the case may be), unless the judge who presides at the trial certify in open court, &c.; and if the judge does not certify, the excess of defendants' costs beyond the costs of the inferior court shall be set off and allowed against the plaintiff's inferior court costs, and if the costs so set off and allowed exceed the amount of the plaintiff's verdict and costs, defendant shall be entitled to execution for the excess.

Our rule of court, number 155, directs that, "In any action of the proper competence of the county court, in which final judgment shall be obtained without a trial, and in which the papers shall not be marked 'Inferior Jurisdiction,' no more than county court costs shall be taxed, without the special order of the court or a judge."

Under section 84 of the Common Law Procedure Act (Harrison's C. L. P. A., p. 163), similar to sec. 3 of the English Common Law Procedure Act of 1854, the award of the referee shall be enforceable by the same process as the finding of a jury on the matter referred.

In *Kendil v. Merrett* (18 C. B. 176), Jervis, C.J., refers to the form of execution prescribed by the rules of court (number 40 of the appendix to our rules), and states the same is not warranted by the statute, and that in order to proceed regularly on the Common Law Procedure Act, it is necessary either that the judgment should be signed, or that an order should be obtained under the imperial statute 1 & 2 Vic. ch. 110, sec. 18, similar to our Consol. Stats., ch. 24, sec. 19. He thought the former the better course, and that the proper course was to sign judgment.

In *Cochrane v. Cross et al.*, and *Cochrane v. Scott*, the order of Mr. Justice Burns was moved against in the full Court of Common Pleas, and the rule was discharged on the 13th of June, 1859, (*a*) Mr. Justice Burns, in reference to the master refusing to tax full costs when the plaintiff recovered an amount within the jurisdiction of the inferior court, observes, "If the plaintiff had gone to the master with an award upon which he could have obtained a final judgment, and was entering up that judgment, then the master would have been right" (in refusing to allow full costs). "This is not such a case. The plaintiff proceeds upon the award and not upon any judgment, and therefore the question is just this, whether an award made in a case, when no verdict has been taken, but the parties are proceeding upon the award, it is to be considered as a final judgment within the meaning of the 155th rule. I think it is not, and therefore the master was wrong in thinking he had jurisdiction to deal with costs on the smaller scale."

I am not prepared to assent to the proposition, that because the order of reference directs that the costs shall abide the event, the plaintiff, if successful, shall have full costs, no matter how small a sum he may have had awarded to him. I think it means no more than this, that he shall

(a) See the decision in Chambers, reported ante page 32.

have such costs as under the statute and rules of court a plaintiff recovering the amount that he recovers by the event is entitled to. The cases referred to decided in England only shew that their County Courts Act, and Lord Denman's Act, as to recovering less than 40s. damages, do not deprive the plaintiff of full costs when the cause has been referred, and the arbitrator has awarded a sum within the jurisdiction of the inferior court, or less than 40s. They have no rule of court there similar to our rule No. 155, and consequently their decisions cannot control cases coming within that rule. For instance, when judgment by default was obtained in England, the plaintiff was held entitled to full costs, except in actions of trespass, &c., where the imperial statute, 3 & 4 Vic. ch. 24, applies, as well when the plaintiff has judgment by default as when on an issue he recovers less than 40s. But ever since the passing of our rule of court of Easter Term, 11 Geo. IV., similar in its provisions to No. 155, in this country full costs have not been allowed to the plaintiff when judgment was entered for a sum within the jurisdiction of the inferior court, though judgment was obtained by default, unless a judge gave an order for such costs. The rule now in force in England as to the two scales of taxation of costs will apply where the sum recovered is below £20.

I think this case turns wholly on the rule of court No. 155. The affidavits shew that the action was one of the proper competence of the county court, the amount of the plaintiff's claim having been reduced to a sum within the competence of the division court by set-off, and not by payment. This, then, is an action of the proper competence of the county court, in which the papers were not marked "inferior jurisdiction." Consequently, no more than county court costs can be taxed, if "final judgment is to be obtained without a trial." It is not pretended of course that there has been any trial, and the remaining point to consider is, whether the plaintiff seeks to obtain final judgment.

It is now stoutly contended that he does not wish to obtain final judgment under the section of the Common Law Procedure Act by which the case was referred, and to issue

execution on such judgment; but he wishes to make the order of reference a rule of court, and then to obtain a rule of court directing the defendants to pay the sum awarded to the plaintiff, and in the event of a non-compliance with the rule of court to obtain an execution under Consol. Stats. U. C., ch. 24, sec. 19. He might obtain execution more speedily and more conveniently by proceeding under section 84 of the Common Law Procedure Act. This roundabout method is resorted to for no other reason, that I can see, but to obtain full costs, and I am asked to aid the plaintiff in thus practically evading the statute and rule of court, by granting an order directing full costs to be taxed. I am not prepared to do this, unless compelled by some legislative enactment, or some express decision.

The affidavit filed on behalf of the plaintiff on this application, states that he requested the taxing officer to say if he would tax full costs, and he refused to tax superior court costs. The deponent further adds, "that such taxation was requested for the purpose of thereon proceeding to enforce the said award by execution on the rule of court in that behalf, as I then informed said clerk." The appendix No. 40 to the rules contains the form of an execution where the matter was referred as in this case, and *Kendil v. Merrett* is an authority to shew that a judgment should be entered before such execution can properly issue, and if a judgment is to be entered the case comes within the 155th rule. The bill of costs produced on this application does not shew that the order of reference had been made a rule of court, which is the first proceedings usually taken when the award is to be enforced by attachment, or by what is now submitted for attachment.

If the plaintiff intended to proceed to execution against the defendants by the same proceedings as were formerly taken to enforce an award by an attachment, he must be quite certain that he could obtain the rule of court directing the payment of the sum awarded, for if such a rule was not made, that proceeding would fall to the ground. The court always exercised its discretion as to enforcing awards by

attachment, and would frequently leave a party to his action, when it was thought any injustice was likely to be done by proceeding by attachment. I think the same discretion would be exercised as to directing a sum of money to be paid pursuant to an award, (a) and I shall expect to find that, when the court is called upon to direct the payment of money in this way, merely for the purpose of enabling a plaintiff to tax superior court costs, contrary to the spirit of the enactment and rule of court on the subject, the reply will be that in the exercise of its discretion the court will refuse to make the order.

If from the materials placed before me it is doubtful as to the mode in which the plaintiff intends enforcing his award, I think I must assume that he will do so by entering his judgment under the 84th section of the Common Law Procedure Act, which the court in *Kendil v. Merrett* decided was the proper course, and in that view, I must refuse the order; or if I am at liberty to consider whether the court would or would not direct the payment of the money awarded, with a view to the issuing of an execution (and taxing full costs) against the defendants, when the plaintiff has the right to issue his execution under the statute, without the intervention of the court, then I should say the court would not make such an order. In this view of the case I must also refuse the order to take full costs.

Without deciding that the plaintiff is bound to enforce his award under the 84th section of the Common Law Procedure Act, though that would seem to be the more regular and proper course, I am not prepared, under the facts of this case, to direct that full costs of the superior court should be taxed. The case comes expressly within the 155th rule; it is of the proper competence of the county court, and is brought in the superior court; and consequently no more than county court costs can be taxed.

(a) See the next case, at page 81.

IN THE MATTER OF ARBITRATION BETWEEN THOMAS AND
BROOKE.

*Award—Order to pay over—Execution—Consol. Stats. U. C., ch. 24,
sec. 19.*

To obtain execution under Consol. Stats. U. C., ch. 24, sec. 19, for money awarded, it is not sufficient to make the submission a rule of court. The defaulter must not be called upon to shew cause why he should not pay, specifying the sum, and a rule absolute obtained.

The award in this case ordered certain securities to be assigned to a trustee, who was to dispose of them, and out of the proceeds pay a certain sum to the applicant. Semble, not an award on which an order to pay would be granted.

[PRACTICE COURT, E. T., 1860.]

During this term Eccles, Q.C., obtained a rule calling on Thomas to shew cause why the judgment and writ of fieri facias upon the award, submission, and rule of court, should not be set aside for irregularity, with costs, on the following grounds:

1. That no rule of court ordering payment of money, or calling on defendant to shew cause why it should not be paid, or why said judgment should not be entered, had been first obtained.

2. That the award itself does not direct payment of money, or warrant the judgment or fi. fa.

Albert Prince shewed cause, and contended that, the submission being made a rule of court, the award being under it was also drawn to it, so that what was directed to be done by the award was substantially ordered to be done by the court.

Eccles, Q. C., contra, argued that our statute in effect gave the same mode of enforcing awards that the imperial statute 1 & 2 Vic. ch. 110, did. He referred to Russell on Awards, 618, to shew that under the 1 & 2 Vic. it was necessary to obtain a rule of court to direct the payment of the money under the award, before any execution could issue. He further urged that in this case the award did not direct the payment of money, and even in that view could not be enforced by execution.

RICHARDS, J.—The imperial statute, 1 & 2 Vic. ch. 110, sec. 18, provides “that all decrees and orders of courts

of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments, in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this act, * * ; and all remedies hereby given to judgment creditors, are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

By the provincial statute, 22 Vic. ch. 33, sec. 12, Consol. Stats. U. C., ch. 24, sec. 19, pages 280-281, it is enacted, "For the purpose of enforcing payment of any money or of any costs, charges or expenses payable by any decree or order of the Court of Chancery, or any rule or order of the Court of Queen's Bench or Common Pleas, or any decree, order or rule of a county court, the person to receive payment shall be entitled to writs of fieri facias and venditioni exponas respectively, against the propriety of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively and subject to the same rules, as nearly as may be, as in the case of a judgment at law in a civil action; and such writs shall have the like effect as nearly as may be, and the courts and judges shall have the same powers and duties in respect to the same, and in respect to the proceeding under the same, and the parties and sheriff respectively shall have the same rights and remedies in respect thereof, and the writs shall be executed in the same manner and subject to the same conditions, as nearly as may be, as in the case of like writs in other cases."

Section 14 (section 15 of Consol. Stats. U. C., p. 280) provides that every decree or order of the Court of Chancery, and every rule or order of the Court of Queen's Bench or Common Pleas, and every decree, order or rule of a county court, directing payment of money or of costs, charges

or expenses, shall, so far as it relates to such money, costs, charges or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of the act for the abolition of imprisonment for debt, and the said persons shall respectively have the same remedies, and the courts, and judges and the officers of justice shall, in cases under this act, have the same powers and duties, as in corresponding cases under the said act. And section 17 (Consol. Stats. U. C., ch. 89, sec. 51, p. 893) enacts that "Every rule or order of the Court of Queen's Bench or Common Pleas, or of a judge thereof, directing payment of money other than costs, and every rule or order of a county court directing such payment, may be registered in the registry office of any county, and such registration shall be on the certificate of the same officer and shall have the same effect as the registration of a judgment of the same court."

The provisions of our statute, and those of the English act, 1 & 2 Vic., ch. 110, are to the same effect so far as the power is given to issue executions for non-payment of money pursuant to a rule of court, and the decisions under the English act will apply to our own.

Jones v. Williams (11 A. & E. 175) is one of the first cases decided under the English act, and seems to have been approved of by the subsequent decisions. In that case the execution issued on the award after the submission had been made a rule of court. A motion was made to set it aside for irregularity, as no other order had been made for the payment of the money mentioned in the award. The court made the rule absolute.

Lord Denman, in the concluding part of his judgment, says, "We therefore think that the power of issuing execution on a rule must be confined to cases where the money payable by the rule is expressed in the rule itself. * * * There is no difficulty as to giving effect to the act of parliament as to awards, if a proper case is made out: and that is, by calling on the delinquent party to shew cause why he should not pay a certain sum of money pursuant to the award. If that rule be made absolute, an execution may

issue for the sum distinctly specified in the rule so to be obtained." This seems to me to be a clear authority for making this rule absolute.

The submission in this case was by bond, dated the 11th of July, 1859. It was made a rule of court in Hilary Term last, and judgment was entered without any other rule or order. As far as I can understand the award, it does not direct the payment of any money, but rather directs that certain properties and securities are to be assigned to a trustee, who is to dispose of the same, and out of the proceeds to pay a certain amount found to be due from Brooke to Thomas.

I should doubt if under this award the court would direct Brooke to pay this amount, so as to enable Thomas to issue an execution for it. The cases go to shew that the court will not always order the money to be paid, but leave the party to his remedy by action. Most of the authorities as to the mode of issuing execution under the statute are referred to in Chitty's Archbold, 10th ed., p. 1628, and in Russell on Awards, 606, 612. There is also a valuable note at page 47 of Dowling & Lowndes' Practice Cases, vol. 2, and a case of Hawkins v. Benton et al., in the same volume, reported at page 465.

The rule will be made absolute with costs.

Rule absolute.

THE NIAGARA AND DETROIT RIVERS RAILWAY COMPANY
v. BUCKWELL.

Award—Order to pay—Execution.

A rule nisi calling upon defendant to shew cause why execution should not issue against him for a sum awarded, the submission having been made a rule of court and the sum demanded, was discharged on the ground that the plaintiffs should first have called upon him by rule to pay. See the last case.

The award directed payment of a sum by monthly instalments, with a proviso that on default in payment of any of them the whole should fall due.

Quære, whether the court would order payment of the whole sum, unless it were shewn that defendant had notice of the award before default made.

[PRACTICE COURT, E. T., 1860.]

Jarvis moved for a rule calling on the defendant to shew cause why a writ of execution should not issue against him for the sum of £338 17s. 1d., the amount awarded to be paid to the plaintiffs, with interest, and for £38 18s. 10d. costs taxed, and the costs of the application. The affidavit of service shewed that the rule nisi was served on the 30th of May, and it was moved absolute by O'Reilly, Q.C., on the 2nd of June. No cause was shewn against it.

The case was referred to arbitration by order of Mr. Justice McLean, on the 22nd of November, 1859, and his order was made a rule of court during the last term, and was served on the defendant's attorney, probably on the 25th of May, but there was no affidavit of service. The award was dated 23rd of December, 1859, and found that there was due to the plaintiffs £338 17s. 1d., which they awarded to be paid in six monthly instalments of £56 9s. 6d. each, with interest upon each instalment as it should fall due, subject to this express proviso—that if default should be made in payment of the said instalments, or any or either of them, then and from thenceforth the whole amount should forthwith become due and payable. They found the expenses of the award £18 15s., and directed that they should follow the award.

The plaintiffs' secretary, by his affidavit, sworn to on the 28th of May, 1860, stated that he did, on the 26th of May, personally serve the defendant with the original rule in this cause making the submission to refer to arbitration a rule of court, also the original award with affidavit of execution

thereof, and also the master's allocatur of costs taxed under said submission, by delivering to defendant personally true copies thereof respectively, and shewing him the originals. He at the same time served a written demand on and demanded of the said defendant the said sum of £338 17s. 1d., with interest from the 23rd of December, 1859, to the 26th of May instant, also the costs taxed by the master's allocatur, which he declined to pay, alleging his inability to do so at present. He further stated that the money was still due and owing to the plaintiffs.

RICHARDS, J.—I have already expressed my views, in the case in which I have just given judgment, (a) as to the necessity of obtaining a rule or order of the court directing the payment of the sum awarded before an execution could issue under the statute for the amount so awarded. When this rule was moved I intimated to the gentleman moving it that in my view the proper course was to call on the defendant to shew cause why he should not pay the money directed to be paid by the award, and I supposed he had taken out his rule for that purpose, and so noted it in my book. As he did not think proper to do so, I do not see that I have any power to make the present rule absolute. If both parties were before me I might feel more at liberty to mould the present rule, so as to make it an order for the payment of the amount awarded. As that is not asked for, I do not think I can with propriety let the rule go for that purpose.

I do not at present decide whether, all other proceedings being regular, under an award like the present, payable by instalments, where the arbitrators in default of the payment of one instalment declare the whole sum due, I would direct the whole sum to be paid by rule of court, when it did not appear that the defendant ever had notice of the award until after default had been made in the payment of some of the instalments.

The award itself recites the submission to be by order of Sir J. B. Robinson, whilst the rule of court states it to be the order of Mr. Justice McLean.

(a) In re Thomas and Brooke, ante, page 78.

As I discharge the rule on the ground first mentioned, I only refer to the other points for the consideration of the plaintiffs, in the event of their moving for an order to direct the payment by the defendant of the sum awarded.

Rule discharged.

VANEVERY v. DRAKE.

New trial on payment of costs—Delay in payment—Motion to rescind the rule.

A rule for a new trial on payment of costs was obtained by defendant in Hilary Term. On the 23rd of March the costs were taxed and an allocatur served on the agent of defendant's attorney, but the costs were not paid, and the plaintiff in consequence was thrown over the assizes, which took place on the 23rd of April. On motion to rescind the rule, it appeared that defendant lived some distance from his attorney, who wrote to him three letters, none of which he received, though he attended the post twice a week, until the 21st of April. On that day he paid the costs to his attorney, who did not see the plaintiff's attorney till the 28th of May, and the latter then declined to receive them. The action was brought to try a question of boundary.

Under these circumstances the court refused to rescind the rule, and gave the defendant a month to pay the costs taxed and the costs of this application.

[PRACTICE COURT, E. T. 1860.]

Wood obtained a rule to shew cause why the rule obtained by the defendant granting a new trial in this cause, in Hilary Term last, should not be rescinded, on the ground that the defendant did not prior to the then next assizes, nor had he since paid the costs of the day, pursuant to the condition upon which said rule was granted. He filed the rule absolute granted in Hilary Term, shewing that the new trial was granted on payment of costs, and his own affidavit to shew that on the 23rd of March last the costs of the day were taxed and an allocatur served on the agent of defendant's attorney on the same day: that the spring assizes were held at Brantford on the 23rd of April, but in consequence of the non-payment of the costs the plaintiff was thrown over the assizes.

English shewed cause, and filed the affidavit of the defendant's attorney, stating that the allocatur was forwarded to him by his Toronto agent on the 26th of March: that defendant lived in the lower end of the township of South Dumfries, and that he immediately wrote him as to the amount he had to pay for the new trial: that he had previously re-

quested defendant to attend the post office regularly in order to receive communications from his attorney; that he wrote a second letter a few days after the 23rd of March, and again a third letter to defendant, not having heard from him; that he was informed and verily believed the defendant and his family regularly attended the post office at least twice a week, and that for some reason unknown to the attorney he, defendant, was told by the postmaster there were no letters for him until about the 21st day of April last, when the three letters written to him were delivered; that on the same day he came to the office of the defendant's attorney, and paid over the amount of the costs to him; that the attorney did not see the plaintiff's attorney until the 28th of May, when he told him he had the money for him, to which he replied he would set aside the rule for a new trial if possible. He stated further facts to shew that the delay in paying the costs was not with a view of throwing the plaintiff over the assizes.

The defendant's affidavit filed afterwards confirmed the statements made in the affidavit of his attorney, and stated most positively that he had no desire to throw the plaintiff over the assizes, and shewed that the delay in paying the costs arose from not receiving the letters of his attorney earlier. They were dated, respectively, on the 12th of March, 24th of March, and 10th of April, but were not received by defendant, though asked for by himself or some member of his family as often as twice a week, until the 21st of April.

English, for the defendant, in shewing cause, urged that as the delay was the result of an accident, and as the action was really brought to try the title to some two or three acres of wild land, it was of little consequence to the plaintiff whether tried at the last assizes or the next, and as the defendant had offered the costs to the plaintiff's attorney before the rule was moved absolute, he contended the costs subsequent thereto ought not to be allowed, and that the plaintiff's rule should be discharged.

Wood contra, contended that defendant having made default, and the plaintiff having lost a trial in consequence, the rule must be made absolute. He referred to *Grantham v.*

Powell, 1 P. R. 256; Rabidon v. Harkin, 2 P. R. 129; Johnson v. Sparrow, 1 U. C. R. 396.

RICHARDS, J.—The cases to which Mr. Wood has referred clearly shew that the court will exercise a discretion as to making these rules absolute. The full court having decided that it was desirable that the facts of the case should be submitted to the consideration of another jury, and as the object of both parties is to settle the question of boundary between them, I think I shall exercise a sound discretion by giving the defendant an opportunity of having his case brought before another jury. As the plaintiff has been strictly regular throughout, I think he is entitled to his costs. If the defendant pays the costs taxed on the former rule and the costs of this application within a month from this date, then the rule nisi moved in the Practice Court will be discharged, otherwise it will be made absolute.

LYMAN ET AL. V. SNARR.

New trial—Delay in taking out rule—Application to rescind.

In Michaelmas Term on application by defendant for a new trial the plaintiffs had leave to amend their declaration within a month, the rule to be then discharged. The time was accidentally allowed to expire without amendment, which the clerk of the Crown refused then to allow, and defendant after the spring assizes took out and served the rule absolute for a new trial.

Held, that the omission of defendant to take out and serve the rule absolute before the assizes formed no ground for rescinding it, for the plaintiffs might themselves have obtained and served it if they had desired to go to trial; but owing to defendants' delay, and the point being new, the rule to rescind was discharged without costs.

[PRACTICE COURT, E. T. 1861.]

Hector Cameron obtained a rule calling on the defendant to shew cause why the rule absolute for a new trial in this cause should not be set aside and rescinded, on the ground that it was improperly issued after the defendant had by his delay in obtaining it abandoned his right to such rule, and on the ground that defendant not having taken out or served a rule absolute for a new trial before the last spring assizes, and not having enabled the plaintiffs to proceed to trial at that assizes, the said rule for a new trial should be discharged or rescinded.

Mr. Cameron filed his own affidavit on moving the rule, stating that a rule nisi to set aside the plaintiffs' verdict was obtained by defendant, and judgment given on it at the sittings after last Michaelmas Term, when the court gave the plaintiffs leave to amend their declaration: within a month, and on that being done, the rule nisi was to be discharged: and that the plaintiffs accidentally allowed the month to expire without amending the declaration: that the plaintiffs' counsel did not consider the month mentioned in the judgment of the court as a peremptory period, or that defendant would take any advantage of the amendment not being made within that time; and when he found the time had expired, and that defendant would seek to take advantage of it, he did not press the matter, because he expected as the plaintiffs had a further claim against defendant for the same matter in litigation, he might be able to settle the whole amicably with defendant, but found that he was not able to do so: that he gave defendant's attorney notice of taxation of costs for the 14th of May, 1861, and attended at the master's office for the purpose of making the amendment of the declaration and entering up judgment, but the clerk of the Crown refused to allow the amendment to be made, as the time limited had expired, and defendant's attorney then obtained the rule absolute and served him with a copy, which he annexed: that before the clerk of the Crown issued the rule he objected to his doing so, on the ground that defendant by his laches in taking it out and allowing an assize to pass over had abandoned his right to it, but the clerk of the Crown refused to allow the amendment. He concluded his affidavit by saying, that if defendant had taken out and served the rule before the last Toronto assizes, the plaintiffs would have been willing to go to a new trial if defendant had wished it, as the verdict was a small one, less than they thought they were entitled to, but defendant did not in any way notify the plaintiffs of his intention to take out the rule until long after the assizes, and thereby the plaintiffs were unable to go to trial at the last assizes.

During Easter Term M. C. Cameron shewed cause, and contended that it was as much the duty of the plaintiffs as defendant to take out the rule: that as the same was ordered by the court the plaintiffs were the only party to do anything under it: that if they had amended within the month it would have been discharged, and then they should have taken out the discharged rule: that if defendant had by the rule been ordered to pay the costs, as a condition precedent to the new trial, then it might be urged he was bound to take out and serve the rule in time to have the costs taxed and paid before the assizes. He referred to *Earl of Harborough v. Shardlow*, 8 M. & W. 265; and *Savage v. Thompson et al.*, 9 M. & W. 248.

Hector Cameron, contra, contended that defendant was bound to take out his rule and serve it before the next assizes. He, as well as M. C. Cameron, referred to the analogy of parties having a rule nisi for entering a nonsuit discharged on entering into a peremptory undertaking to try a cause at the next assizes, in which case it was the duty of the defendant, if he wished to obtain the rule, to enter a nonsuit for non-compliance with the peremptory undertaking, to serve the rule containing the undertaking within the time limited by it for taking the case down to trial. He referred to *Gingell v. Bean*, 1 M. & G. 50; *Chase et al. v. Gobel*, 3 M. & G. 635; *Farrer v. DeFlinn*, 8 Jur. 779; *Grantham v. Powell*, 1 P. R. 256; *Rabidon v. Harkin*, 2 P. R. 129; *Proudfoot v. Holden*, 1 Chamber Rep. 22.

RICHARDS, J.—All the cases seem uniform, that when a new trial is granted on payment of costs, and the party on whom it rests to pay the costs without sufficient excuse omits to take out his rule and have the costs taxed in proper time, then the court will discharge or rescind the rule for the new trial. The case referred to in the 8th Jurist is an authority to shew that when a new trial is granted on payment of costs, and the party without receiving the costs goes down to the second trial, he has no means of collecting the costs of the first trial. In this view it seems just that when the costs are not paid, and a trial is lost by such laches, the

rule for the new trial should be rescinded. But in the case before us the plaintiffs would not have sustained any loss by going down to trial. If they chose to waive the right to amend, they could have given notice of trial at any time, and I do not see that the defendant, unless he gave notice of the abandonment of his rule, could have prevented them from going down to trial at the last spring assizes.

The argument drawn from the analogy of rules discharged on peremptory undertakings, and for which *Gingell v. Bean* was quoted as an authority, does not hold good, for the practice there supported only prevailed in the Court of Common Pleas, and did not obtain in the Court of Queen's Bench. *Sawyer v. Thompson* shews that Baron Alderson adopted the same rule in that case in the Exchequer. But the subsequent case of *Nathan v. Story* (6 D. & L. 259) in which all the modern cases are reviewed, shews that the Court of Queen's Bench adhered to a different practice; and finally, in Easter Term, 12 Vic. (6 D. & L. 627), all the courts made a rule that if a plaintiff made default in proceeding to trial pursuant to his undertaking, the defendant should be at liberty, if the plaintiff did not draw up the rule, to draw it up at any time before moving for judgment, and thereupon to move for judgment without serving a copy.

I have looked through the practice and digest in vain to find a case exactly like this.

The conclusion at which I have arrived, not, I must confess, without considerable doubt, is that the plaintiffs cannot treat the omission of the defendant to take out and serve the rule in what they consider due time as an abandonment of it, so as to justify them in signing judgment, and therefore the clerk of the Crown was right in not allowing the plaintiffs to amend their declaration and to enter judgment. I fail to see that the omission to take out and serve the rule before the last spring assizes affords sufficient grounds for rescinding it now, for I cannot see, if the plaintiffs had desired to do down to trial at those assizes, that they were prevented from doing so by anything the defendant had done or omitted to do, and I am inclined to think if they had desired it they

might have taken out the rule themselves and served it, if they had wished to take the cause to trial according to its terms.

Under the circumstances, I am not prepared to make this rule absolute. As the defendant, however, by his delay in taking out the rule, has to a certain extent caused this application, and the point seems new, the rule will be discharged without costs.

Rule discharged without costs.

BOOTH v. THE PRESTON AND BERLIN RAILWAY COMPANY.

Interpleader.

Interpleader may be directed for the proceeds of a sale in the sheriff's hands.

The sheriff seized goods on the 1st of October, and sold a portion on the 17th and 26th. On the 4th of November one R. claimed, and much correspondence ensued. On the 23rd of December, R. sued the sheriff, who on the 31st obtained an interpleader summons. On the hearing it was admitted that R. owned all that he at last claimed, part of which had been sold, and the rest, with the proceeds of the sale, remained in the sheriff's hands; and it was not shewn clearly that the plaintiff had directed the seizure of these particular goods.

Under these circumstances it was ordered that R.'s action against the sheriff should be stayed, and his claim against the execution plaintiff barred on delivery to him of his goods unsold and the proceeds, without deduction, of the sale, and that the plaintiff should be barred as to such goods and proceeds. The sheriff was ordered to pay the costs of R.'s action, as he might have applied before it was brought, and the parties to pay their own costs of this application.

[CHAMBERS, March, 1860.]

An interpleader summons was granted on the 31st of December, 1859, at the instance of the sheriff of the county of Waterloo, calling on the plaintiff and Samuel C. Ridley to appear and state the nature of their claims to the goods seized. The parties appeared, and on their different applications the summons was enlarged from day to day till the present month.

The facts, as they appeared on affidavits filed, and on which there was no dispute, seemed substantially as follows:

The sheriff on the 1st of October last seized a quantity of frame timber, boards, door and window frames, ties, rails, truck-wheels, 20 dirt carts, &c., &c.; and sold a quantity

of them on the 17th and 26th of October, the remainder being still in his hands.

On the 4th of November, notice of Ridley's claim was given to the sheriff. Several communications passed between Ridley's attorney and the sheriff, and the former would seem to have formally laid claim to a larger quantity of property than he ultimately asserted to be his. The goods seized were in different places along the line of road, and much correspondence and communication seemed to have passed between the parties, which, as was alleged, induced the sheriff to delay applying for relief before the 31st of December. On the 23rd of December he was served with process at Ridley's suit.

At the hearing, all parties seemed agreed as to the ownership of the property, and it was conceded that Ridley was entitled to all that he finally pointed out as his in the affidavit of his agent, Carpenter, part of which was sold, and the proceeds were still held by the sheriff, and the other part was still in his hands.

Several affidavits were filed as to what passed between the sheriff and Mr. Martin, the plaintiff's solicitor, the latter contending that he had not instructed the sheriff to seize any property in particular.

It seemed conceded that the matter must be settled between Ridley and the sheriff, as it was not clear that substantial justice could be attained by compelling Ridley and the plaintiff to interplead either as to the goods or the proceeds, the plaintiff not claiming the goods claimed by Ridley, and it not being clear whether it was at his special instance the latter were taken by the sheriff.

Robert A. Harrison appeared for the sheriff.

J. B. Read, for Ridley.

Jackson, for the execution plaintiff.

HAGARTY, J.—Mr. Read suggested that Ridley would not be duly indemnified by awarding to him the proceeds of his goods at sheriff's sale, and that the action should be allowed to proceed. The affidavits filed on behalf of Ridley con-

tained no assertion that the goods had been sold at an under-value, or any special damage sustained by their loss. In a case in which the claim is not made until after the sale, I do not feel called on to assume that the proceeds in the sheriff's hands do not represent the fair value.

It was also objected that the interpleader relief could not be given as to the money made.

The statute, Consolidated Acts of U. C., ch. 30, sec. 8, expressly speaks of claims to goods and chattels taken in execution, "or to the proceeds or value thereof," and enables the court and judge to deal with the case either before or after return of the process, or before or after any action has been brought against the sheriff, and to make such rules and orders as appear just according to the circumstances of the case.

I consider the law to be settled that interpleader can be directed for the money in the sheriff's hands.—*Hall v. Kissonck*, (11 U. C. R. 9); *Scott v. Lewis*, (2 Cr. M. & R. 289), and other cases.

Assuming the jurisdiction to be clear, it remains to be seen how the case should be disposed of on the merits.

In *Abbott v. Richards*, (15 M. & W. 195) Pollock, C. B., says, "I find no suggestion in the affidavits of any special damage; and the supposed hardships on the party of having his goods seized and sold, perhaps, for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the judge at the time of the making of the order. . . . There may perhaps be some doubt as to the extent of the judge's authority under the act. My impression is that he has a right to do all that is just, proper, and equitable under the circumstances."

Winter v. Bartholomew, (11 Ex. 705) is an exceedingly strong case. The sheriff entered a house of one Mister, and there seized goods on an execution against defendant. Mister claimed some of the goods, and commenced an action against the sheriff for breaking and entering his house and seizing his goods. The sheriff obtained an interpleader summons, and Martin, B., ordered the goods claimed by Mister to be given up to him, and the execution creditor be

barred as to them, the sheriff to sell the other goods seized in the house belonging to the defendant; and the action against the sheriff was ordered to be stayed. The court after argument refused to rescind the order so made. Alderson, B., said, "The object of the interpleader act is the adjustment of adverse claims, but there is incidentally a power to protect the sheriff when he is subject to an action, and it is unjust that he should be sued. If the sheriff has been guilty of misconduct the court will not protect him; but where he has done no wrong the legislature intended that the court or judge who makes the interpleader order should protect him against vexatious actions. It is much more just that the matter should be left to the discretion of the court or a judge than that the sheriff should be subject to vexatious actions."

I am of opinion that an order should be made that the action brought by Ridley against the sheriff be stayed, upon the sheriff delivering to him all the goods mentioned in Carpenter's affidavit remaining unsold in his hands, and paying to him the proceeds without deduction of the sale of such of his, Ridley's, goods as have been sold, and on such delivery and payment that Ridley be barred as against the sheriff and the execution plaintiff of all claims in respect of such seizure or sale: that the execution plaintiff be barred as to the said goods of Ridley and the proceeds.

As the sheriff might, I think, have applied before Ridley's action was brought, I think he must pay the costs of action; but under the circumstances I think the parties must pay their own costs of this application.

MERCER v. VOGT ET AL.

Change of venue on plaintiff's application.

The plaintiff in a transitory action, having his choice of venue at first, can only be allowed to change it on shewing good ground.

In this case, which was an action on a note, with the venue laid in Oxford, and non fecit pleaded, the plaintiff swore that unless he could try at the winter assizes in Toronto he would be very likely to lose his debt, and that from conversations with defendant he believed the plea was put in for time only; no affidavits were filed in answer. Held, sufficient.

[CHAMBERS, December, 1857.]

This was an action on a note. Plea. Non fecit.

The venue was laid in Oxford. The plaintiff moved on affidavit for leave to amend his declaration, by changing the venue from Oxford to York and Peel, on the ground that unless he could try the cause at the winter assize in the latter counties he would be very likely to lose his debt. He also swore that from conversations with defendant he believed the plea was pleaded to gain time merely, and that there was no real defence. No affidavits were filed by defendant, but he objected to the proposed change.

HAGARTY, J.—The practice is not very explicitly stated in the books. In Chitty's Forms, 1856, page 771, note (a) it is stated, "In a transitory action, if the plaintiff having laid the venue in one county afterwards desires to change it to another, he may obtain a judge's order for leave to amend the declaration by altering the venue accordingly, upon satisfying the judge that there is reasonable ground for the application."

In Chitty's Archbold, 1856, vol. 2, p. 1273, it is said, "If the plaintiff from circumstances should afterwards desire to change the venue (in a transitory action) he may obtain leave to amend his declaration, upon stating to the court or judge any reasonable ground for the application, and this even after plea pleaded and issue joined, or after a nonsuit."

In Bagley's Practice, 322, "As the plaintiff has it in his own power to lay the venue in the county in which it is most convenient for him to try in the first instance, if he has omitted

se to do, the amendment will only be permitted under peculiar circumstances, and uniformly upon payment of costs."

In *Fife v. Bousfield* (2 Dowl. N. S. 705), 1843, Williams J., says, "The defendant might have had good grounds for asking the court to change the venue, but the plaintiff, who had his option when he brought his action, and had a complete knowledge of all the circumstances connected with it, must shew a reasonable ground for such an application. I think that the application is not a matter of course, but that the plaintiff must lay his grounds for it."

Most of the older cases are cited in *Crooks v. House* (3 O. S. 308), where an application was made by the plaintiff to change the venue after his cause having been struck out of the docket at the Niagara assizes, his only reason being that by changing to the Home assizes he could try his case earlier. The court refused his application as inconsistent with general practice, "unless some very strong grounds were laid for it."

Robertson v. Hayne (16 C. B. 560), *Turnley v. The London and North Western Railway Company* (16 C. B. 575), may be noticed.

Our own rule of court of Trinity Term, 20 Vic. No. 19, says, that "in all cases the venue may or not be changed, according as it shall appear to the court or judge that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or in that in which the venue has been laid.

On the whole it appears to me that it rests altogether on the case the plaintiff can make out for making the change desired.

In this case I think he has shewn sufficient grounds, and I allow the plaintiff to amend his declaration, as asked in the summons, on payment of costs, and that the venue be changed accordingly.

THE PROVIDENT PERMANENT BUILDING AND INVESTMENT SOCIETY v. MCPHERSON.

Notice of trial—Undertaking.

The plaintiffs obtained a judgment on a specially endorsed writ, which was set aside by judge's order. Defendant's attorney then wrote to the plaintiff's attorney asking for a day or two to plead under the order, and adding, "I will take any notice of trial." The assizes began on the 12th of October. The plaintiffs served their declaration too late to compel pleas before the 13th, when they were served, but they entered their record and waited until the 7th of November, when they gave notice of trial for the 12th. Held, that the letter did not oblige defendants to accept such a notice, and the verdict was set aside.

[QUEEN'S BENCH, H. T., 1858.]

Declaration on a covenant in a mortgage made by the defendant payable to the plaintiffs.

The defendant pleaded, as to part of the sum demanded, a recovery by judgment in this court, and that such judgment had been satisfied.

2. Payment of part of the other moneys claimed.

3. As to the residue of the plaintiffs' claim, never indebted. The plaintiffs took issue on these pleas.

At the trial, at Toronto, before Draper, C.J., the plaintiffs took a verdict for £108 6s. 3d, which they claimed to be the balance after deducting the amount of the former recovery pleaded.

The plaintiffs had proceeded by a specially endorsed summons, and in September, 1857, obtained judgment for default of appearance. On application to a judge this was set aside on payment of costs, and the defendant allowed to plead, on affidavit of merits, and on the condition that if necessary the defendant should take short notice of trial.

On the 25th of September, 1857, the defendant's attorney wrote to the attorney for the plaintiffs, requesting that the plaintiffs would "give him a day or two to plead under the order," and adding, "I will take any notice of trial."

The declaration was filed and served on the 6th of October, with notice requiring defendant to plead in eight days.

The defendant filed his pleas on the 13th of October. The assizes for Toronto, where the venue was laid, opened on the 12th of October.

The plaintiffs did not serve notice of trial till the 7th of November, and then served it on the Toronto agent of defendant's attorney, who lived at Chatham.

The notice was for trial on the 12th of November, and the defendant's attorney received it on the 9th.

He swore that before receiving the notice of trial he had no intimation that the record had been entered for trial; and that he had no intention, by what he said in his note about taking any notice of trial, to bind himself to accept a notice given after the commission day.

On the 10th of November the agent of the defendant's attorney in Toronto gave notice to the plaintiffs' attorney that he would move against the verdict for irregularity if the plaintiffs should persist in taking the cause to trial.

McCrea obtained a rule nisi to set aside the verdict for irregularity.

A. Morrison shewed cause.

..

Read, Q.C., supported the rule.

ROBINSON, C.J., delivered the judgment of the court.

This proceeding on the part of the plaintiffs' attorney cannot in our opinion be upheld. It should require us to place a construction upon the consent of the defendant's attorney which we do not think we should be warranted in doing. The plaintiffs delayed filing their declaration so long that they could not have compelled a plea in the ordinary course before the assizes commenced, and having demanded of the defendant that he should plead in eight days, they enter their record within eight days, and when it was not in a condition that entitled it to be entered, for the parties were not at issue, nor had any judgment been signed.

And they wait for about three weeks after entering their record before they give any notice of trial, and then serve it when the assizes are about to close.

The rule to set aside the verdict has not been moved with costs, and we do not therefore give costs, but make the rule absolute.

Rule absolute.

O'NEILL ET AL. V. EVERETT.

Service of papers—Waiver.

Defendant was served out of this province in September, 1859, with an ordinary writ of summons, addressed to him as of the township of Sombra. The declaration was filed on the 4th of March, 1860, and a copy served by putting it up in the office of the deputy clerk of the Crown at Belleville, and by leaving it at the last place of abode of the defendant there, and the issue book and notice of assessment was served in the same way. On application to set aside the proceedings, the defendant, who was an attorney, swore that he knew nothing of any steps taken after receiving the writ until the verdict had been obtained. The plaintiffs' attorney, in answer, swore that after service of the summons he had several conversations with the defendant, who requested him to make no more costs, but give him time to settle, in consequence of which he delayed serving the declaration personally, as he could otherwise have done.

Held, 1.—That the fact of defendant being an attorney could not make the service good, for it was not shewn that he was practising, nor that he had not a booked agent at Toronto, nor that copies had been put up in the Crown office there.

2. That it could not be upheld under our rule of court No. 133, no leave of the court or a judge having been obtained.
3. That the request made by defendant for time could not be treated as a waiver of his right to a proper service; but in consequence of it the proceedings were set aside without costs.

[PRACTICE COURT, E. T., 1860.]

During this term Morphy for defendant obtained a rule calling on the plaintiffs to shew cause why the declaration in this cause, the copy and service, and all subsequent proceedings, should not be set aside for irregularity, with costs, on the grounds that the declaration was not personally served on the defendant, service having been made by putting up a copy in the office of the deputy clerk of the Crown at Belleville, and a copy of said declaration left at the last place of abode of the defendant; and that such service was made without an order authorizing such mode of service, no order for leave to proceed having been made;

Or why the interlocutory judgment signed in this cause, and the assessment of damages thereon, should not be set aside for irregularity, with costs, on the grounds last mentioned, and also on the ground that no notice of assessment was served in this cause;

Or why the interlocutory judgment and assessment of damages should not be set aside without costs, and the defendant let in to plead, on the grounds aforesaid, and on the grounds disclosed in affidavits and papers filed, and on the merits.

The papers and affidavits filed on behalf of the defendant shewed that he was served with an ordinary writ of summons in this cause, addressed to him as of the township of Sombra, in the county of Lambton, on the 3rd of September, 1859. The defendant stated in his affidavit that the copy was served on him out of this province, and within the United States territory. He further stated that he never was served personally with any other paper in this cause, (up to the 27th of April last), nor did any other paper in the cause come to his hands or knowledge. It further appeared that the declaration was filed on the 4th of March, 1860, and a copy with notice to plead was served on the same day, by putting the same up in the office of the deputy-clerk of the Crown at Belleville, from whence the writ issued; and also by leaving a copy of the declaration and a notice to plead at the last place of abode of the defendant, in Belleville, with a grown up person there. Interlocutory judgment was signed for want of a plea, on the 2nd of April, and copies of issue book and notice of assessment were served on the same day, in the same manner as the copy of the declaration.

On the 18th of May defendant by his attorney R. P. Jellett, gave notice to the plaintiffs' attorney that he would move for a rule to set aside the writ, and all subsequent proceedings, on the ground of irregularity, in this, that defendant was a British subject residing abroad, and should have been served with process pursuant to the statute, and that no declaration was served on the defendant, and that the proceedings taken after the service of the writ were taken without any order having been made by a judge authorizing the same; and on merits and other grounds disclosed in affidavits.

The defendant in his affidavit further stated, that if he had been served with a declaration in the cause he would have pleaded to the action: that he was informed and believed he had a good defence on the merits in this cause: that he was in Belleville for several weeks after the summons was served on him, and conversed with the plaintiffs' attorney, Mr. O'Hare, on the subject of the suit, and he had every

opportunity to have served him, defendant, with a declaration in this cause if he had so chosen: that he was informed that the cause was brought down at the last assizes at Belleville, and a verdict rendered for the plaintiffs for over three hundred pounds: that he had no knowledge of any kind that proceedings were being taken in the cause, nor was he aware that any steps in the cause, other than the service of the copy of the writ, had been taken, or was taken, until he heard that a verdict had been rendered against him.

During the term O'Hare shewed cause, and filed the affidavit of John O'Neill, the next friend of one of the plaintiffs. He stated that the defendant conveyed to the plaintiffs certain land, the south $\frac{1}{2}$ of lot 12 in the 6th concession of the township of Hungerford: that he acted as agent of the plaintiffs in the purchase of the land; and that the defendant drew the deed and was paid by the deponent, as agent of the purchasers, £300 for the land; that the defendant had no title to the land at the time of the execution of the deed, nor had he since any right or title to it, or power to make any conveyance of it; that one Simon Badgley was then and now is the true and sole owner in fee of the land: that the plaintiffs had never by themselves or tenants, or otherwise, been in possession of the land: that after the defendant had been served with the summons in the cause he had several conversations with deponent as to settling the suit, but was not willing to pay the amount originally paid to him for the land: that the action was tried at the last Belleville assizes, and a verdict was rendered for the plaintiffs for £372, or thereabouts.

Mr. O'Hare filed his own affidavit, in which he stated that after the service of the summons on the defendant he had several conversations with him, in all of which he requested the deponent to make no more costs, and give him time to settle with the plaintiffs on easy terms: that he, deponent, acceded to the defendant's request, but he did nothing but exhaust time, and in order not to be thrown over the last assizes, deponent filed and served the declaration on almost the last day for getting to trial.

He further stated that the defendant was a land speculator,

continually moving about and having no settled place of residence, but he could and would have served him with a declaration had it not been that the defendant requested him not to do so: that after the assessment of damages the defendant, after enquiring the amount at which they were so assessed, expressed his surprise that Mr. Wallbridge had not entered an appearance for him, as he had sent him the summons for that purpose: that the defendant had repeatedly promised to settle the claim, but only objected to the amount mentioned in the deed: that deponent told him he might settle as easily as he could, only he must be present to draw the papers and to see that his client was not wronged too much.

Peter Shevelin, a clerk in the office of the plaintiffs' attorney, stated that the defendant at the time of serving the declaration, notice, issue book, &c., was, and he believed still was a barrister and attorney-at-law. He further stated that in consequence of the defendant moving about from place to place it was with a good deal of difficulty they could effect service of the summons on him. He also stated that the place in Belleville at which he left the declaration, &c., for the defendant with a grown up person, was the last place of residence of the defendant in Belleville.

O'Hare contended that on these facts the verdict ought to stand: that the delay in the proceedings was at the solicitation of the defendant, and he ought not now to be permitted to take advantage of the indulgence granted to him.

Morphy, contra, argued that the defendant when served resided out of the jurisdiction, and the plaintiffs ought to have amended their process under sec. 38 of the Common Law Procedure Act, and they would then have been in a position to apply for leave to proceed under the 35th section. He further contended that the defendant was not a practising attorney, and therefore putting up a copy of the declaration in the Crown office could not be good service against him. He referred to rule number 136, of Trinity Term, 1856, and urged that if the defendant's residence was not known the plaintiffs should have applied for an order to serve the defendant under rule No. 133, by putting up

papers in the Crown office: that the defendant could not be considered guilty of laches, as he swore distinctly he had no knowledge of the plaintiffs' proceeding after the receipt of the writ until after the verdict.

RICHARDS, J.—I do not see that the defendant, being a barrister or attorney-at-law, can make the service of declaration and subsequent papers good, if the service would not be good against a defendant who was not a barrister or attorney.

Section 9 of the Common Law Procedure Act directs that the service of all papers and proceedings subsequent to the writ shall be made upon the defendant or his attorney, according to the practice then in force. The section then provides for serving papers on the duly authorized agent of the attorney, and if he have no such agent, then by leaving copies for him in the office where the action was commenced.

Section 63 provides for an appearance being entered by defendant in person, and if he fails to give the proper address at which pleadings are to be served on him, the appearance may be set aside, and the plaintiff be permitted to proceed by sticking up the proceedings in the office from whence the writ was sued out.

Under rule No. 136 of Trinity Term, 1856, every attorney practising in either of the superior courts of common law, and residing within the City of Toronto, shall enter in a book to be kept at the Crown office his name and place of business, or some other place within the city where he may be served with papers, and all papers not requiring a personal service shall be deemed properly served by a copy being left at such place; and if any such attorney shall neglect to make such entry, the fixing up a copy of any pleadings, &c., for such attorney in the Crown office, shall be deemed a sufficient service.

Rule No. 137 directs every other attorney practising in said courts to enter his name and place of business, and also the name of his Toronto agent; and all pleadings, &c., not requiring a personal service, shall be deemed sufficiently served if a copy be served on such booked agent. But if the

attorney shall neglect to make such entry, the fixing up a copy of any pleading, &c., for such attorney in the Crown office, shall be deemed good service.

None of these sections of the act, and none of the rules thus far, seem to apply to the defendant in this case. It is not shewn that he is a practising attorney, or if it was, it does not appear that he has not a booked agent, or that a copy of the proceedings have been put up in the Crown office at Toronto. There is no pretence that the defendant himself appeared to the action, so as to justify the putting up a copy in the Crown office at Belleville. I do not think the service of the declaration and papers subsequent thereto can be deemed good service, merely because the defendant may be an attorney.

Then is the service good if the defendant were not an officer of the court?

It is stated in Chitty's Archbold, 8th edition, at p. 188: "If the defendant's place of abode be unknown, then formerly it would seem that leaving the notice for him at his last place of abode would suffice, according to the wording of the old rules of court on the subject." The modern rules of court seem to require the leave of the court to make a good service in such case.

Rule No. 132, of Trinity Term, 1856, directs that a copy of every declaration and subsequent pleading shall be served on the opposite party.

Rule No. 133 provides that "where the residence of a defendant is unknown, pleadings, rules, notices, and other proceedings may be stuck up in the proper office, but not without previous leave of the court or of a judge." This rule is similar in effect to rule No. 49 of H. T. 2 Wm. IV., (English rules) and under that rule it is laid down in the page of Chitty's Archbold to which I have already referred, that it would seem to be necessary to stick up the notice in the master's office as pointed out by that rule, after obtaining leave of the court or a judge for that purpose, and that service of a notice at the defendant's last place of abode would not alone suffice.

The case of *Troughton v. Craven* (3 Dowl. 436) seems

to be in point. There the defendant had changed his residence since the commencement of the action, and it was not known where he was gone; and the only service of the declaration had been by leaving it at the place at which the defendant last resided, but which he had then left, and by sticking up a copy in the office. On a motion to declare the service good, it was urged on behalf of the plaintiff that such service was sufficient, and reference was made to *Holsten v. Culliford* (1 Bos. & Pull. 214) and other cases, where the court held service at the last place of abode, was good service. Baron Parks said, "This is a case in which, if you had applied to the court, they would have given you leave to serve the declaration by sticking it up in the office. I think that is the course which ought to have been pursued."

Alderson, Baron, said "the rule of Hilary Term of Will. IV., 49, directs that where the residence of the defendant is unknown, the notice of declaration may be stuck up in the office, but not without previous leave of the court." The rule was therefore refused.

I think this authority is in point, and I am bound by it; and unless the conduct of the defendant in asking the plaintiffs' attorney not to go on with the case, to give him an opportunity of settling it, would justify me in coming to a contrary conclusion, I must hold the plaintiffs' proceedings irregular and set them aside.

As I understand the matter, the defendant after service of the writ requested the plaintiffs' attorney to make no more costs, and give him time to settle with the plaintiffs on easy terms, and in consequence of this the plaintiffs' attorney waited until the last moment before declaring, and then served the declaration and subsequent proceedings in the manner already stated. I do not think the defendant by making the request he did waived the right to be served with a declaration in a proper manner. His conduct may have induced the plaintiffs' attorney to delay so long that he could only get to trial by serving the paper in the way he did: I do not think, however, this would justify me in holding that the defendant waived the right to a proper service of the papers on him. If the plaintiffs' attorney delayed

proceedings, relying on the statements of the defendant that he would settle, and in this way was lulled into security, so that he did not serve him with the declaration in a proper manner, it seems hardly right to give the defendant costs for setting aside such proceedings as irregular—proceedings taken in an irregular manner in consequence of delays occasioned by a desire to accommodate the defendant, when defendant himself had requested delay.

On the whole, I think the rule should be made absolute to set aside the service of the declaration and subsequent proceedings, but without costs: the defendant to plead to the declaration served within one week from this time.

Rule absolute.

DELISLE V. ALFRED DEGRAND AND CHARLES RABIDON.

Arrest—Application to set aside.

On an application to set aside an arrest under 22 Vic. ch. 96, *semble*, that the existence of the cause of action may be enquired into, but that the absence of it must be very clearly shewn to warrant interference.

Held, that in this case, on the affidavits set out below, the cause of action and the circumstances to warrant the arrest were sufficiently made out.

Semble, that defendant's own affidavit that he is not about to leave the province would not alone, under any circumstances, be sufficient to set aside the arrest.

[CHAMBERS, November 25th, 1859.]

Summons to set aside the order of the county judge of the county of Essex for defendants' arrest, and the writ of *capias*, with costs, and to discharge defendants from custody, on the ground that the affidavit to hold to bail was insufficient, inasmuch as the plaintiff had no cause of action to the amount of £25, and that the facts and circumstances to satisfy the judge that there was good and probable cause to believe that defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud the plaintiff, were untrue.

The affidavit of the plaintiff, sworn on the 24th of October, 1859, upon which the judge of the county court made an order that the defendant should be held to bail in the sum of \$245.25, stated that the defendants were indebted to him in that sum upon a promissory note overdue, made by

defendant's on the 21st of August, 1857, by which they promised to pay to the plaintiff's order the said sum twelve months after date, without interest: that defendant Degrand, four weeks before the date of the affidavit, told the plaintiff that he meant to go to France to get money, and pay his debts on his return; that the plaintiff was informed that morning by one Gilbert Buisbois and others that both defendants were preparing to leave Upper Canada: that the family of the father of the defendant Rabidon, of which he was a member, had gone to the state of Michigan, and that on enquiry he was informed both defendants were to follow the family, Degrand being married to a sister of Rabidon: that he believed the facts to be true, and that unless the defendants were arrested he would lose his debt, it being their desire, as he believed, to quit Canada with intent to defraud him of the debt.

The defendants both swore they believed the action had been brought on a joint promissory note given by them to one Boisee, the plaintiff and one Morrin being endorsers, as securities for money lent to defendants by Boisee; and that they had no intention of quitting the province. Rabidon swore he believed his arrest was caused through ill-feeling on the part of the plaintiff; and Degrand swore that he believed the plaintiff was merely acting as agent for Boisee, as the day after making his affidavit the plaintiff asked him for \$7 to pay Boisee the interest on the note, as Boisee wanted some: that three months before the plaintiff had acquiesced in his, Degrand, going to France.

Paul Rabidon, a brother of one of the defendants, swore to his belief that neither of the defendants meant to leave the province.

The defendant Charles Rabidon and his brother made a second affidavit of a conversation with Boisee, that he held the note mentioned in the defendants' first affidavit.

Gilbert Buisbois made an affidavit denying the truth of the statement relative to him contained in the plaintiff's affidavit: that he believed this action was brought on a promissory note given by the defendants to one Boisee, the same having been endorsed by the plaintiff: that he believed

the plaintiff was acting only as agent for Boisee, as the plaintiff told him after the arrest of the defendants that his furniture would be sold to pay that note to Boisee unless he did something to justify himself.

In answer the plaintiff put in affidavits. He swore that the promissory note in question was redeemed by him before the action was brought: that he was not acting as the agent of any one in the matter; that before commencing the action James Harken, De La Forrest, and others informed him that defendants were about to leave the province.

Emanuel Boisee swore that the note in question was endorsed by the plaintiff, and was in his hands, but that before the commencement of this suit the plaintiff paid him the amount and took the note back.

Antoine P. Reaume swore that defendant Rabidon about a month ago told him he was going to follow his family, who were gone or then immediately going to the United States.

James Nevill swore that about eighteen months ago the plaintiff and defendant Degrand gave him instructions to draw a chattel mortgage to secure to the plaintiff payment of a promissory note, which he believed to be the one in question: that he did prepare a chattel mortgage, but Degrand would not execute it.

James Harken swore that about two weeks before the issuing of the *capias* he heard from various persons that defendants were going away, and told the plaintiff of it.

John Williams made affidavit to nearly the same effect.

Felix A. Lafferty swore that about five weeks ago defendant Degrand told him he was going to France.

Joseph De la Forrest swore that he lived five months with defendant Degrand: that during this time Degrand spoke frequently of going to France, but at the same time said plainly it was not his intention to go to France, but to the United States of America: that two months ago defendant Degrand said that as soon as he could collect money enough to go to the United States he would leave this wretched country: that on two occasions he sent defendant to collect money, directing him to tell parties to pay it at once, as he was going away to the United States: that Degrand pro-

cured deponent to write a letter to some person in the state of Illinois, to ascertain if it would be a good place for a French doctor, which defendant did, and got the answer annexed to his affidavit: that it was understood between him and Degrand that as soon as the latter went to the United States he should open a drug store, and that in time deponent should join him to be his apothecary: that Degrand said if he could not take his family at once he would leave his wife with her brother, Paul Rabidon, and afterwards send for her; and that long before the *capias* in this cause was taken out he, deponent, informed the plaintiff of the principal facts above stated.

DRAPER, C.J.:—Under the statute 22 Vic., ch. 96 (1858) sec. 2, the plaintiff in order to procure a judge's order must shew, first, that he has a cause of action to the amount of £25, or has sustained damage to that amount. Secondly, he must shew such facts and circumstances as shall satisfy the judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally or the plaintiff in particular.

As to the first point, the plaintiff's own affidavit states all that is necessary to warrant the order to arrest. The affidavits in support of the defendants' application throw considerable doubt on the matter, but Boisee's affidavit, filed in reply on behalf of the plaintiff, sets the matter at rest, and fully establishes the plaintiff's right to sue.

According to the opinion of Coleridge, J., if the plaintiff's affidavit were sufficient in this respect the court would on such an application enquire no further, for he observes, "If affidavits were received which go to the rights of the matter, there would be this inconvenience—a judge might, by listening to the party which swears most stiffly, come to one decision, and the jury on the trial might arrive at another." *Copeland v. Child*, 17 Jur. 507.

In *Pegler v. Hislop*, (1 Ex. 437) the Court of Exchequer expressed a contrary opinion, Parke, B., observing that the defendant was not precluded from disputing at this

stage of the proceedings either the cause of action or other matters which the plaintiff's affidavit contains; but he added, "it must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere." In *Stammers v. Hughes*, (18 C. B. 527) the Court of Common Pleas adopted the opinion expressed in the Court of Exchequer, and virtually overruled that expressed by Coleridge, J. Acting on this decision, I have considered this question, but have no doubt that the summons, so far as this part of the question is concerned, must be discharged.

I have as little doubt on the other point. The affidavit of De La Forrest fully sustains the plaintiff's affidavit, and affords good and probable cause for believing that Degrand was about to leave the province, and that the plaintiff before the issuing of the *capias* was informed of the facts. The case is not so strong with regard to Rabidon, but taking all the facts and circumstances together I do not think it right to interfere. The case of *Graham v. Sandrinelli* (16 M. & W. 191) gave me some doubt, but there the plaintiff's affidavit, on which the order to arrest was made, was not supported by affidavits on shewing cause; and the defendants' own affidavits that they were not about to leave the province, are, I think, sufficiently met; indeed I think they alone would not justify the order prayed under any circumstances. (a)

Summons discharged.

(a) See *Bowers et al. v. Flower*, ante p. 612.

PETER ALLMAN AND CATHARINE HIS WIFE V. KENSEL.

Arrest—Omission of the Court in affidavit—Slander—Right to review decision of C. C. judge.

The name of the court must be inserted in an affidavit to hold to bail at the time of suing out the process, and where it was not inserted until long after defendant had been arrested the arrest was set aside.

In this case the action was by husband and wife for a verbal slander of the latter, not actionable without proof of special damage, and the affidavit stated only that persons not named had in consequence withdrawn their custom from the husband, who was a tailor. The learned judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only, expressing no opinion as to his right to review the decision of the county court judge.

[CHAMBERS, December, 1862.]

This was an application to set aside the order for the defendant's arrest made by the county judge of Essex, with the writ and arrest, &c., on various grounds—the insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what court it was in, and other minor grounds. The defendant filed no affidavits except shewing his arrest on the 11th of December instant.

The only ground for the arrest was an affidavit of the plaintiff Peter Allman, setting out that over three months before the application the defendant had verbally slandered his wife by calling her a whore in presence of several persons; that in consequence of such words various persons (not named) who formerly employed the plaintiff as a tailor had declined so to do, and his wife who worked with him had also lost employment, and that he and his wife had also lost the society, &c., of persons, (not named) and that he and his wife had suffered damage, and that they had a cause of action against the defendant for \$100 and upwards; that the defendant kept a saloon in Windsor, had no ties to bind him to Canada, and could leave without inconvenience; that the plaintiff had been informed the defendant had offered his license for sale, intimating his intention "to leave the said town;" that there was good and probable cause for believing, and the plaintiff did believe that the defendant was about to quit, and unless forthwith appre-

hended that he would quit Canada with intent, &c., to defraud the plaintiff and his wife, and without satisfying him and her for the damage so occasioned. This was sworn on the 8th of December, 1862, and on the 10th instant the learned judge gave a fiat to arrest for \$100.

On the 11th of December the defendant was arrested, and served with a copy of writ in the Queen's Bench, tested the 10th of December. On the 15th his attorney swore to the paper now produced being a true copy of the affidavit on which the order to hold to bail was issued; but that such affidavit was not filed in the deputy clerk's office when process issued, nor up to the time of making his (the attorney's) affidavit. No name of any court appeared at the head of the affidavit.

On the 18th of December the summons for discharge was granted by Morrison, J. In shewing cause the plaintiff filed an affidavit dated 24th of December, annexing a copy of the judge's fiat, and stating that the fiat was filed in the deputy clerk's office when the writ was issued; that the affidavit was delivered to the judge, who retained the same till the 23rd of December, when he delivered it to the deputy clerk, and that in Essex it was customary in obtaining summonses and orders from the judge to file and leave the papers with him, and he delivered them to the clerk of the proper court; and that when the defendant was arrested he deposited \$100 with the sheriff as bail, and the sheriff then let him go.

Spencer, for the plaintiff. Blevins, contra.

HAGARTY, J.—I must, in the first place, express my great surprise and regret that any person should have been held to bail on such statements as were sworn to in this matter. It is the first time I ever heard of an arrest being ordered for verbal slander. It is notorious that in such cases (however gross) the damages rarely exceed a few dollars, and that in all human probability the limit of £25, fixed as the lowest sum for which arrest is allowed, would never be reached. But here the words of themselves are not even actionable, and the plaintiffs could not recover except on proof of special damage clearly proved, and an allegation that persons

unnamed had withdrawn their custom in consequence would hardly satisfy most minds. Such an allegation would not support a declaration, and where no cause of action exists without proof of the damage, it would seem only reasonable to expect to find the affidavit more explicit.

Again, no facts whatever are stated to raise the belief that the defendant is about to leave the province. His offering his license for sale, and talking of leaving the town of Windsor, cannot amount to anything unless connected with some other circumstance. If the belief of the plaintiff, unsupported by any reasonable ground therefor, is to be held sufficient, the statute is rendered of little avail.

I repeat, therefore, my inability to understand how any man's liberty should be infringed on such statements.

When process was issued on the judge's fiat an affidavit was not filed in the clerk's office till nearly two weeks, nor was the name of any court put at the head of the affidavit for many days after the issuing of the process and the arrest, nor apparently up to the issuing of the summons. The Act, ch. 24, Consol. Stats. U. C., sec. 6, declares that it shall not be necessary that it should be entitled in any court at the time of making it, but that the title of the court may be added at the time of suing out the process; "and such style and title, when so added, shall be for all purposes, and in all proceedings, whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*."

I quite agree with the views expressed on this point by Mr. Justice Richards in *Swift v. Jones* (6 U. C. L. J. 63), and that our statute clearly points out the course to be adopted as to entitling affidavits. I think it was the plaintiffs' duty to see it properly entitled when suing out the process; then and then only, as it seems to me, can he avail himself of the privilege allowed by our statute. On this ground I think the arrest must be set aside.

There seems to be a difficulty in dealing with orders made by judges for arrest after exercising their discretion on the materials before them. In this case I have no affidavits from defendant negating the intention to leave, and am therefore asked to review the discretion so exercised.

Draper, C.J., in *Terry v. Comstock* (6 U. C. L. J. 235), says, "It was not pressed upon me to review the decision of the learned judge who made the order for the arrest upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. If this had been done I should have referred the matter to the full court."

I had occasion to notice the law on this point in *McInnes v. Macklin* (6 U. C. L. J. 14).

As I can see my way to disposing of the case on the other ground, I do not feel called upon, in the absence of any affidavits from defendant, to discuss this point any further than has been done in the cases cited. If the defendant desires to rescind the order, I must refer him to the full court.

I direct that the writ and arrest of defendant, and all proceedings had thereon, be set aside, with costs to be paid by the plaintiffs, and that the sheriff do return to defendant the money deposited with him in lieu of bail, or if any bail-bond be given, that it be delivered up to be cancelled.

I desire to be understood as expressing no opinion as to my right to review the county court judge's decision in a case like the present.

SMITH ET AL V. THE COBOURG AND PETERBOROUGH RAILWAY COMPANY.

Chattel Mortgage — Possession taken by mortgagee — Sheriff's duty under execution against mortgagor.

A mortgagee of chattel property having taken possession, as he alleged, under his mortgage, the sheriff seized it under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again: Held, that there was no power to make such order.

Semble, that under an execution against a mortgagor the sheriff may seize goods in possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption.

[CHAMBERS, September, 1859.]

The plaintiffs had assigned their judgment to one John Fowler, who caused execution to be placed in the hands of the sheriff of the United Counties of Peterboro' and Victoria some time in June last, upon which writ of execution the

sheriff seized two locomotives, some platform cars, and other property of the defendants. John H. Dumble, of Cobourg, made claim to the same as the mortgagee thereof, and thereupon the sheriff applied for an interpleader summons. An order for an issue to be tried was made. While that order was in force, and before anything had been done upon it, the sheriff proceeded to sell the equity of redemption of the defendants in the property so seized. Upon the application of J. H. Dumble that sale was set aside, as being a violation of the interpleader order. The interpleader order was made originally under the idea and belief that Dumble claimed title to the property seized by virtue of an absolute assignment, and not as mortgagee thereof, and consequently, when it was ascertained that such was the fact, an application was made on the part of Fowler, the assignee of the plaintiff's judgment, to rescind the interpleader order. The order was rescinded, Dumble consenting thereto, and no opposition being made by the sheriff, though the sheriff now swore that he did not assent to it or authorize any one to assent to the rescinding of the order.

Since these proceedings it appeared the sheriff had again seized the property, and was intending to proceed to sell the same. On the 8th of September Mr. Justice McLean granted a summons, calling upon John Fowler to shew cause why the sheriff should not deliver up to Dumble, the mortgagee, the property seized, the same being seized in possession of the said Dumble as such mortgagee. This application was supported by Mr. Dumble's affidavit, stating that he had taken possession under his mortgage, and that on the 5th of September the sheriff seized the same for the interest of the defendants in the equity of redemption thereof at the instance and on the behalf of Fowler, the debt due to Dumble still being unpaid and unsatisfied; and he stated that Fowler knew at the time of the seizure of the existence of his, Dumble's, mortgage, and that the pretence for seizing the property was on account of the defendants' equity of redemption.

The application was opposed upon a variety of affidavits,

setting forth circumstances to shew that Dumble had not the possession of the property, but that it still remained in the possession of the company; that Dumble was merely a manager for the company in the conduct of their business, and that if he had any control over the property it was as such manager of the company and not as mortgagee thereof. The sheriff swore that he did not believe that Dumble ever had any possession of the property, and that it was necessary he, the sheriff, should have the possession, in order to effect a sale. He stated that Dumble's debt was not due.

BURNS, J.—It is quite out of the question that I can try upon affidavits whether Dumble was or not in possession of the goods, or under what circumstances he was in possession, if he were in truth in possession at the time of the sheriff's seizure. There seems to have been some mismanagement in this matter from the beginning, for now the affidavits in reply to the application attack Mr. Dumble's mortgage on the ground that it forms no valid security, and that in fact it is not real. If that be so, and by the present sale of the goods it is intended to dispute the validity of the mortgage, I cannot understand why the sheriff should have permitted the interpleader order to be rescinded, for had that remained Mr. Dumble in the issue to be tried would have been obliged to support and sustain the mortgage. I suppose, however, the sheriff, although he now swears he never assented to the order being rescinded, must have permitted it to be rescinded, and it seems now, by the course he has taken, that he is satisfied to question himself the validity of Dumble's mortgage. Even before the interpleader order was rescinded the sheriff appears to have taken part with Fowler, who was interested in pressing the execution, for notwithstanding he had asked the protection of the court he went on to sell the defendants' equity of redemption.

It does not appear to me that the court or a judge has any power to interfere in the manner Mr. Dumble now asks. If the property was in possession of the defendants, the mortgagors of it, then I apprehend there can be no question

the sheriff had a right to seize the property and to deprive the mortgagors of the possession. If the sheriff disregards the mortgage, contending that it is invalid and forms in truth no legal charge upon the property, then I suppose he would sell the corpus of the goods, but in that case he assumes the responsibility of establishing what he contends for, if the mortgagee does not submit. If the sheriff submits to the mortgage, then, although he has taken the corpus of the goods, finding them in the possession of the mortgagor, he could sell only the equity of redemption in them.

On the other hand, if the sheriff finds the goods in the possession of the mortgagee, then what is the sheriff's duty in such a case? The mortgagee in the present case has applied to a judge to order the sheriff to restore to him the possession. He could not obtain such possession by replevin, for the goods when taken by the sheriff are in the custody of the law. The mortgagee contends the sheriff has no right to deprive him of the possession on the pretence that he seizes an equity of redemption. I take it the mortgagee is right in that proposition, but still I think the sheriff is right to make a seizure of the goods themselves in the possession of the mortgagee, in order that he may sell the equity of redemption. I think that is the effect of the new provision enabling the sheriff to sell the equity of redemption upon an execution against the goods and chattels of the mortgagor. (Consol. Stats. U. C., ch. 45, sec. 13.) If the mortgagee has the legal custody of the goods, the sheriff cannot, of course, upon an execution against the goods of the mortgagor, take the property from the custody of the mortgagee, but still I apprehend he must seize them in order to sell the mortgagor's interest. Upon an execution against land it is the estate upon which the writ operates, and not the corpus of the land, but upon an execution against goods it is the possession of the property upon which the word "seize" acts. I appears to me that it would be very absurd to speak about seizing an interest or equity of redemption in goods which the sheriff may never see, but where the selling of the interest is spoken of then we can understand that. Suppose there be a quantity

of new goods mortgaged, if the sheriff seizes the goods and exposes the interest of the mortgagor for sale, a purchaser may be found giving something for that interest beyond the mortgage debt, but if the goods be some worn out furniture a purchaser would give very little, if any thing, for the interest. This interest, whether it may be valuable or in fact worth anything at all, most certainly cannot be determined without the goods being viewed, and I know of no way to insure that but to construe the word seize used in the act referred to, to mean the same thing in case the goods be in the possession of the mortgagee as it would if they were in the possession of the mortgagor.

I cannot, however, take upon myself to decide between the parties, and order a delivery of the goods, under the circumstances. If the mortgagee shall suffer by the act of the sheriff, so that his debt is lost or diminished in amount, he must seek his remedy against the sheriff for such injury or damage.

I do not discharge the summons with costs, though it be moved with costs, for this application grows out of the new act; and besides, it seems to me there is some little foundation for thinking that the sheriff, instead of acting indifferently between the two contending parties, has given the preponderance to Mr. Fowler.

Summons discharged, without costs.

READ ET AL. V. COTTON AND MANNING.

Attorneys' bill—Taxation “Special Circumstances”—Consol. Stats. U. C. ch. 35, sec. 30.

The plaintiffs acted as attorneys for defendants from 1854 to 1858. In 1855 they had a large claim for costs, which it was agreed to refer to arbitration, but defendants settled it on a reduction being made. The plaintiffs afterwards continued to act, and rendered full bills each half year, no objection being made to them until a short time before this action, which was brought by the plaintiffs in January, 1860. Defendants on being sued applied to have the bills taxed, not pointing out any particular error, but alleging generally that the charges were excessive.

Held, that no “special circumstances” were shewn within the Consol. Stats. U. C., ch. 35, sec. 30, and the order was refused as to all bills delivered more than 12 months.

[CHAMBERS, March, 1860.]

This was an action on attorneys' bills.

Robert A. Harrison applied for the usual order to refer to taxation, with leave to dispute retainer as to a portion of the business done.

The facts may be thus shortly stated: from 1854 down to September, 1858, the plaintiffs were the attorneys of defendants, who being contractors in large business were involved in much litigation.

In an important arbitration matter, in 1855, some thousands of pounds were received by the plaintiffs for defendants. The plaintiffs had then a large claim for costs. Bills with items were given to defendants, and money retained to pay this claim. The defendants objected to the amount. The plaintiffs were always willing to have the accounts adjusted, and at last a reference to two professional gentlemen was agreed to in writing by the parties. Afterwards the defendants, to avoid the trouble and expense of this reference, came to a settlement with the plaintiffs. The latter made a considerable reduction in their claim, and the matter was closed.

The plaintiffs continued for several years doing business for defendants, and every half year rendered full bills of costs to defendants. Many bills were thus rendered. No dispute whatever nor objection to any of the bills took place till within a few months before the action was brought. Many letters were written to defendants in 1859 asking for a settlement, and offering to have the bills taxed. At last, on the 25th January, 1860, a writ was issued.

The defendants did not point out any erroneous charge, but merely swore that they considered the plaintiffs' charges excessive, &c.

Read, Q. C., shewed cause. He insisted that, as more than twelve months had elapsed since all the bills except one had been delivered, there could not be any reference, and cited *Cowdell v. Neale*, 1 C. B. N. S. 332; *In re Whicher*, 13 M. & W. 549; and he relied on the words of ch. 35, Consol. Stats. U. C., sec. 30: "No such reference shall be directed, &c., &c., after twelve months from the time such bill was delivered, except under special circumstances, to be proved to the satisfaction of the court or judge."

Harrison, contra, contended that the fact of the plaintiffs continuing to be defendants' solicitors during most of the time while the bills were delivered was a "special circumstance" under the act. He cited the collection of cases in notes to Chitty's Statutes, vol. I., "Attorney."

HAGARTY, J.—I am of opinion that the settlement in 1855 cannot now be opened by a reference of the plaintiffs' bills. Every thing seems to have been fairly done. No pressure is shewn, but a constant readiness to submit to taxation, and the defendants after the agreement to refer expressly agree to a compromise, waive the reference, and settle the amount due. I refer on this point to *Ex parte Turner*, before the Lords Justices in 1854 (27 Eng. Rep. 555).

As to the bills subsequently delivered, I have come to the opinion that the defendants fail to shew any special circumstances within the meaning of the statute to dispense with the twelve months' limitation. Were it the case of an isolated bill of costs delivered to the defendants, the matter would be too clear for argument, and I cannot see how the facts of the bills being delivered annually or semi-annually during the several years that the relation of attorney and client continued can in this case make any material difference.

There is no allegation that the relation in any way operated to induce defendants not to have the bills taxed.

They do not say that the plaintiffs made any representation to them as to the charges, or in any way induced them to abstain from enquiry. To my mind the fact of the defendants receiving these bills from time to time and making no objections, and continuing to employ the plaintiffs, raises the presumption that they considered all to be right, and acquiesced in the charges.

It is a most important feature in the case that defendants do not point to any overcharge, but content themselves with the general allegation that the charges are excessive.

I find it suggested in some of the cases that the "special circumstances" should be "some new matter which has come to the knowledge of the party, who should shew that he has used due diligence in applying to the court on learning it."—*In re Whicher* (13 M. & W. 549).

Lord Cranworth seems to adopt the same view *In re Barnard* (15 Eng. Rep. 298, 17 Jur. 53). "If special circumstances are allowed to be urged after the lapse of time, they must be circumstances which the party must shew that he could not reasonably be expected to have urged before."

Knight, Bruce, L. J., says, "A mere overcharge cannot, in the absence of fraud, be taken to amount to a 'special circumstance' to tax the bill after all that has here been done." In this case judgment has been obtained for the costs.

Most of the cases on this subject are in equity. I have examined the following: *In re Wells*, 8 Beav. 416; *In re Bennett*, 8 Beav. 467; *In re Fyson*, 9 Beav. 177; *In re Harrison*, 10 Beav. 57; *In re Williams*, 15 Beav. 417; S. C., 21 Eng. Rep. 551; *In re Bernard*, 2 DeG. M. & G. 359, S. C. 15,298; *In re Shrewsbury and Leicester R. W. Co.*, 20 L. J. Chy. 325, S. C., 5 Eng. Rep. 41; *Ex parte Pemberton*, 19 Eng. Rep. 489; *In re Dickson*, 28 L. T. Rep. 153; S. C., 3 Jur. N. S. 29; *Blagrove v. Routh*, 3 Jur. N. S. 399; S. C., 28 L. T. Rep. 111; *In re Strother*, 30 L. T. Rep. 63; S. C., 3 Jur. N. S. 736.

At law I find in *re Dearden*, 9 Ex. 210 (dissenting from *In re Harrison*, 10 Beav. 57). It is said to be a matter for the discretion of the court. The Chief Baron says, "The

very object of this statute was to give such a discretion as not to fetter the exercise of it, so as to stand in the way of justice being done between the parties in a case newly arising."

The case of *Cowdell v. Neale*, cited by Mr. Read, seems to assent to the opinion that a general allegation of overcharges does not amount to a "special circumstance."

The defendants here are not shewn to be ignorant men, not likely to understand their rights. They do not suggest that any deception was practised or inducement held out to prevent them at any time from ascertaining the correctness of the plaintiffs' charges.

It is not necessary here to decide whether the bills would be referred to taxation after twelve months in a case in which some very gross overcharges were pointed out, such overcharges as perhaps (in the language of several of the equity cases) might amount to fraud. After the lapse of several years it is well known how difficult it becomes to prove all the items of account between attorney and client. The statute creates a bar after twelve months, unless special circumstances are shewn, and it now seems conceded that the courts cannot act independently of that statute in their common law jurisdiction.

I think the defendants fail to bring their case within the exceptions, and therefore I discharge the summons to refer. except as to the one bill delivered within the twelve months, which must of course be taxed in the usual way.

CROFTS V. MCMMASTER ET AL.

Cause struck out at trial—Costs.

Where defendants' counsel was ready at the assizes, and the plaintiff's counsel not being prepared the cause was struck out. *Held*, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but that their proper course was to have insisted upon a nonsuit.

[CHAMBERS, June, 1863.]

On the 22nd May last the defendants obtained a rule of court that the master do tax them their costs, for that the

plaintiff had not proceeded to trial pursuant to his notice, if it should appear to the master that costs ought to be paid. This rule was duly served.

On reference to the master he decided as follows:—

“I think costs cannot be allowed. Defendants should have moved for a nonsuit if they were ready to go on at nisi prius.

22nd May, 1863.

C. SMALL.”

The affidavit on which the rule issued stated. 1. That issue was joined on the 7th of March, 1863. 2. That notice of trial was given thereon for the last assizes held at London on the 16th of March last. 3. That the plaintiff did not proceed to trial nor countermand such notice in due time. 4. That the record was struck out by the judge because the plaintiff was not ready to proceed with the trial.

John Wilson, Esquire, made affidavit that he was defendants' attorney in this cause: that he was present in court at the assizes when the record was struck out, the plaintiff's attorney not being ready to proceed with the trial, and assigning as a reason therefor the absence of a witness.

McBride, for defendants, now applied for an order upon the master to tax to the defendants their costs upon the above rule, and he contended that any rate, where the defendants' attorney was present in court and ready to proceed with the trial, and the plaintiff's attorney was either not present or not ready to proceed, that costs of the day, or costs for not proceeding to trial pursuant to notice, might be taxed to him, for the judge might strike the cause out of the list in such a case, and that defendants were not bound to have the plaintiff called and nonsuited. He referred to the following authorities bearing upon the question: *Allott v. Bearcroft*, 4 D. & L. 327; *Morgan v. Fernyhough*, 25 L. T. Rep. 219, 11 Exch. 205, S. C.; *Leech v. Gibson*, 10 Weekly Reporter, 354.

WILSON, J.—It is said in *Marshall's Law of Costs*, p. 126, “In town causes the ‘costs of the day’ means only the costs of the last day when the record is withdrawn or the cause is made a remanet. But at the assizes the costs

of the day are not confined to the day when the record is withdrawn, but extend to the whole assizes. Where upon a writ of trial notice was given for the 28th of October, and on that day the trial was adjourned to the 30th, and the same was subsequently adjourned to the 2nd and then to the 4th November, and the writ was then withdrawn, a question arose whether the defendant was entitled to the costs of all the above days or only of the last day. The masters were of opinion that defendant was only entitled to the costs of the last day."

In Gray's Law of Costs, 371, "costs of the day" are said to be such costs which have been incurred by the party in preparing to try the cause according to notice as are thrown away and must be incurred over again for the purpose of a trial at a future time.

It has been the invariable rule of practice in this province that "costs of the day are all such costs which have been incurred by the party in preparing to try according to notice, as are thrown away and must be incurred over again for the purpose of a trial;" and to treat those costs which a party is entitled to where his opponent does not proceed to trial pursuant to notice as the costs of the day. These two expressions mean the same thing, and I do not think we are at all affected by the niceties that may exist in England about town causes and others, and whether tried at the sittings in term or out of term or at the assizes.

It is true by our C. L. P. Act, sections 205, 226, and 227, a distinction is made between town and country causes, but that is for the mere purpose of providing for the extra assize which takes place in the city of Toronto and in York and Peel.

The course of proceeding at the trial is stated to be as follows, in the 11th Edition of Archbold's Practice, 381: "The attorneys for the plaintiff and defendant should take care to be in court with their evidence and witnesses in readiness when the cause is called on; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited; or if the defendant's attorney and witnesses be not in attendance, the plaintiff may proceed

in their absence. If neither party be present when the cause is called on it will be struck out of the list."

The question which arises in this case is whether, when the defendant's counsel is present and ready to proceed, but the plaintiff's counsel is not present, the defendant's counsel must have a jury sworn and the plaintiff called and nonsuited to entitle him to costs, or whether he may get the costs of the day for not proceeding to trial pursuant to notice if in such a case the cause is struck out of the list.

No doubt, if the plaintiff give notice of trial and do not countermand or enter the record, or even if he enter his record but afterwards withdraw it, the defendant may get the costs of the day; but can the defendant get the costs of the day in any case when the cause is struck out of the list, the plaintiff not being present, and he, the defendant, although present, not asking for a nonsuit?

In *Warne v. Hill* (7 C. B. N. S. 726, 6 Jur. N. S. 959), it is said by Williams, J., that if the defendant is present and the plaintiff is not, he may pursue one of two courses—either he may get the cause struck out and then come to the court and ask for costs of the day, or he may insist upon a nonsuit; and *Allott v. Bearcroft* (4 D. & L. 327), is referred to as laying down the rule as above stated.

In *Morgan v. Fernyhough* (11 Exch. 205), it was held that a defendant is not entitled to costs of the day for the plaintiff not proceeding to trial pursuant to notice, where no one appeared on the defendant's behalf at the trial when the cause was struck out.

It is not quite easy to make out from the case whether the court in their further observations mean that even if the defendant had been present he could have claimed the costs of the day when the cause was struck out, because his proper course was to have the plaintiff nonsuited, or what else is meant, for the Chief Baron says: "If the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away." That is, a nonsuit would have ended the suit entirely, whereas, after the costs of the day are paid, the defendant may again take the plaintiff down to trial, and nonsuit him, which is going

over a part of the same proceedings again, which have been already paid for, to gain the same end, namely, a nonsuit, which might have been had upon the first occasion.

There can be no question but that formerly the defendant might have got a rule for costs of the day for one default, and judgment as in the case of a nonsuit for a subsequent default. *Clark v. Simpson* (4 Taunt. 591); *Dyke v. Edwards* (2 Dowl. P. C. 53).

But in *Leech v. Gibson* (10 Weekly Reporter, 354), it is expressly decided that if a defendant be in court, and the plaintiff be not ready to try, the defendant must insist upon a nonsuit, if he desires to get the costs for not going to trial; and if he do not take this course, but the cause is struck out by the judge, he cannot then have the costs of the day.

The plaintiff applied to set aside the rule of the defendant, directing the plaintiff to pay the costs of the day. The cause was entered for trial at Liverpool. The plaintiff's attorney had not delivered any brief, nor was he in court with his witnesses when the cause was called on. The defendant's affidavits shewed that the defendant's counsel was present, and said he was ready when the cause was called, and that he had his witnesses also present. The defendant's counsel did not apply for a nonsuit, and the cause was simply struck out.

“Brett, Q. C., for the defendant, shewed cause. A defendant is not bound to ask for a nonsuit. [WILDE, B.—But if he does not do so, can he have the costs?] The costs of the day, which are quite different from the costs of a nonsuit. [WILDE, B.—But if he waives the costs to which he is entitled, can he have other and different costs, to which, by the practice, he is not entitled?] The cause was struck out. [CHANNEL, B.—If the defendant does not apply for a nonsuit, it is the act of the court to strike out his cause * * BRAMWELL, B.—There is the side-bar rule for costs for not proceeding to trial. The plaintiff did not proceed to trial. It might be said, perhaps, in your favour, that a defendant is not only not bound to ask for a nonsuit, but may prefer that the plaintiff should not be nonsuited because that allows him to sue again, and the defendant may desire not to have

another action. Now the plaintiff, if there is no nonsuit, must either go on with the same action, or give up his action altogether; and the defendant may say, 'I do not wish to help him to put an end to this action, and so leave him to bring another: I wish to have the action put an end to at once.'] Just so. BRAMWELL, B.—Only that tends to shew that your proper course was to take out a rule for costs for not proceeding to trial. POLLOCK, C.B.—As you did not apply for anything, it was as though you had not appeared at all at the trial. It has never been so held.] POLLOCK, C.B. —[The contrary has never been held.] Perhaps not, but if it is so held now, it will come to this, that a defendant must always insist upon a nonsuit. The effect will be to increase the expense of litigation. [WILDE, B.—There is good sense in that argument, no doubt. * * Suppose you had applied to me for costs of the day, could I have given them?] Yes. [WILDE, B.—The plaintiff not being there? Surely not. CHANNELL, B.—It has been held that the plaintiff cannot be nonsuited if the defendant is not present to have the cause called, and the jury sworn.—*Morgan v. Fernyhough*, 1 Jur. N. S. 688.] There the defendant was in default. [WILDE, B.—Still the case is, in principle, the same as this. He did not apply to have the case called on.] * *

"BRAMWELL, B.—The rule must be absolute to set aside the defendant's side-bar rule for costs of the day. It is not necessary to say anything more than was said in the course of the argument. We abide by the principle then laid down, that the defendant must take the ordinary course of applying for a non-suit. If the cause is once entered for trial, it may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendant to have it called on for trial, and insist upon a nonsuit. If the defendant does not take that course, he cannot claim the costs of the day. The cases cited on the argument are very nearly in point."

Theoretically, the decision thus referred to is the proper one, but this has not been the course of practice in this province. I cannot, however, say that when these defendants' counsel was ready at the trial, and the plaintiff's coun-

sel was not, and the defendants' counsel did not ask for a nonsuit, but the judge struck the cause out of the list, that the master has done wrong in refusing to tax to the defendants their costs for the plaintiff not proceeding to trial pursuant to notice, for, as above stated: "It may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendants to have it called on for trial, and to insist upon a nonsuit."

And it appears to me there is much force in this reasoning, for it was held, while judgment as in the case of a nonsuit could be moved for, that such a motion never could be made when the cause had been once taken down to trial, and made a remanet, or referred to arbitration, &c., &c., for the plaintiff had complied with the statute by having taken it down, and it was for the defendant afterwards to take the record down himself by proviso.

I must, therefore, refuse the application, and refer the defendants to the full court, if they shall be so advised to proceed further.

Order refused.

CALDER V. GILBERT.

Arbitration—Costs.

A cause was referred at *nisi prius*, and a verdict taken subject to the award. Costs of the cause were to abide the event, and the same power was given to the arbitrators to certify for costs as the judge at the trial would have. The award reduced the verdict to \$68, and directed that the defendant should pay the plaintiff's costs of suit according to the scale to be certified by the court of Queen's Bench.

Held, that the arbitrators having express power to certify, and having omitted to do so, a judge in Chambers had no power to order full costs.

[CHAMBERS, June, 1863.]

At *Nisi Prius* a verdict by consent was taken for the plaintiff, for \$414 damages, subject to be increased, reduced, or a verdict entered for defendant, subject to a reference to two persons, and to such third person as they should appoint, to whom all matters in difference in the cause were referred.

The costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the

arbitrators, and the arbitrators were to have the same power to certify for costs, and amend particulars or pleadings, as a judge at *Nisi Prius* would have.

The award was that the plaintiff should recover from the defendant \$68, in full of his claim, and that the defendant should pay the plaintiff the plaintiff's costs of suit according to the scale to be certified by the Court of Queen's Bench, and should also pay the costs of the reference and award.

Richards, Q.C., now moved for an order upon these papers, and upon affidavits, to the master to tax full costs of suit to the plaintiff.

WILSON, J.—The affidavits shew a case very clearly beyond the jurisdiction of the County Court, but the verdict as reduced by the award shews a case within the competency of the Division Court.

If the costs had been merely to abide the event of the suit, it is likely the cases cited by Mr. Richards, of *Morse v. Teetzel*, (1 P. R. 375,) and *Elmore v. Colman*, (4 O. S. 321,) would have been full authority for granting an order for full costs.

But in this case the arbitrators have the power to certify for costs as a judge at *nisi prius* could have done, and they have not certified, but they have left the scale of costs to be certified by the court.

Now this is the very thing—the scale of costs—they were to have adjudicated upon themselves, for the control of the costs was not submitted to them : they were to abide the event of the award. And how can the court now, when both plaintiff and defendant have by express agreement conferred this power upon the arbitrators assume to decide this very question at the plaintiff's request, either *ex parte* at his instance, or adversely upon notice to the defendant?

I think this is not a case within the 162nd section of the C. L. P. Act, in which the arbitrator may “state his award as to the whole or any part in the form of a special case for the opinion of the court.”

Spain v. Cadell, (9 Dowl. P. C. 745,) and the other cases cited in Harrison's C. L. P. Act, 516, &c., clearly shew, I think, that this power was exerciseable by the arbitrators, and that it must be exercised in like manner as the judge would have exercised it, namely, immediately after his decision, by putting it in the award, which precludes the power of a reference by him to the court.

If the arbitrators have power to certify and omit to exercise it, the judge before whom the cause came on for trial cannot grant a certificate, his power being transferred by the submission to the arbitrator.—Richardson v. Kensit, (6 M. & G. 712.) Where the certificate of the judge may be given at any time, and no power is given to the arbitrator to certify for costs, the judge by whom the cause was referred may certify after the award made.—Ivey v. Young, (5 Dowl. P. C. 450,) Russell on Awards, 389-390; Astley v. Joy, (9 A. & E. 702.)

Section 328 of the C. L. P. Act requires this certificate to be given by the judge who tried the cause. His power may be delegated to an arbitrator; then the arbitrator must exercise it. He has not done so. I cannot, therefore, interfere. It is needless to say whether, if no power had been given to the arbitrator to certify, either the court or a judge could properly interfere. The cases above cited in our own courts shew it might be done, but this case is not such a case as was decided upon either of those occasions.

I, therefore, must refuse the order.

Order refused.

WARD v. VANCE—THOMPSON, GARNISHEE.

Garnishment—Service of the attaching order and summons to pay over—Unauthorized acceptance of service—Waiver by appearing to the summons.

An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance endorsed, was afterwards served in the same way as the order. On the return of it another attorney appeared for the garnishee, and objected that the acceptance was given without authority, and that the service was insufficient.

Held, that personal service of the summons and order was not indispensable, but that the service in this case if moved against would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee; but

Held, also, that in this case no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured.

Held, also, that the appearance of the garnishee by another attorney duly authorized was a waiver of any objection to the service.

The order to pay over was therefore made.

[CHAMBERS, June, 1863.]

The execution creditor had obtained a summons upon the garnishee to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debtor.

On the summons was endorsed an acceptance by Mr. Wilson, an attorney practising at Bradford, of service for Mr. Thompson.

Mr. O'Brien appeared on the return of the summons, and objected for Mr. Thompson to the service made, on the ground that Mr. Wilson had no authority from Mr. Thompson to accept this summons. The summons was enlarged subject to this exception.

On the return Mr. Paterson appeared and renewed the objection for Mr. Thompson. And he contended that the attaching order had never been properly served on Mr. Thompson, as the affidavit shewed that it was on the 14th of April served on Mr. Thompson, "by delivering a true copy thereof to and leaving it with Mr. Brunskill at the store and residence of the said David Thompson;" and on the 15th of April, "that a true copy of the summons and order, and also of the endorsement thereon, were served on the said David Thompson by leaving copies at the store and residence of the said David Thompson."

Mr. Paterson further urged that the 29th section of the C. L. P. Act,—which provides that the “service upon the garnishee of an order that debts due,” &c., “shall be attached, or notice thereof to the garnishee in such a manner as the judge directs, shall bind such debts in his hands, and by the same or subsequent order it may be ordered that the garnishee shall appear before the judge,” &c., “to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor,” &c.,—shews very clearly that personal service was contemplated by the Act, and more particularly when by other provisions of the Act the process is so summary against him “in case he does not appear upon the summons,” which might readily happen if personal service were not made and insisted upon.

Mr. Tilt, in support of the summons, urged that the appearance now of Mr. Paterson for Mr. Thompson was quite sufficient to cure any defect of service, if there was any defect—but that there was none; that the acceptance of service by Mr. Wilson, being an attorney of this court, was *prima facie* sufficient evidence of his authority to give such acceptance, and cured all prior defects, whatever they were in the service.

WILSON, J.—The statute does not require in express terms that there shall be a personal service, as our King’s Bench Act of 1822 did of the Ca. Re. upon the defendant; and I cannot say that the rule of law is so stringent as to require a personal service of a copy of the attaching order, or to make void every other service than a personal service.

On the contrary, I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought—that is, where it is the purpose and object—to charge the party with a contempt for not appearing to or for not performing some act required by the summons, writ, rule or order.

I find this laid down in Tidd’s Pr., 9th ed. 500; Arch. Pr. 6th ed. 1210, and Arch. Pr. 11th ed. 162.

Then as to some of the decisions upon this point:—in

Jones dem. Griffiths v. Marsh, (4 T. R. 464,) it was decided that a notice to quit possession of land did not require personal service, although it was urged "this notice was to determine an interest in lands ;" and service upon a maid-servant of the tenant at his house, although the house was not upon the premises in question, the notice being explained to her, but it was not shewn that it ever came to the defendant's hands, was held good service

Lord Kenyon, C.J., said : "This is different from cases of personal process; but even in the cases alluded to of service" (of declaration of ejectment) "on the wife, I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient. So wherever the legislature has enacted that before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. * * And, indeed, in some instances of process leaving it at the house is sufficient, as a subpoena out of Chancery, or a Quo Minus out of the Exchequer. In general the difference is between process to bring the party into contempt and a notice of this kind, the former of which only need be personally served on him.

"Buller, J., *Ex concessis* personal service is not necessary in all cases."

The service of the process of the courts it will clearly appear did not formerly require personal service, by a reference to Tidd's Pr., 109, 155, and 156, and to 2 Price, 2 and 4, and 3 Bl. Com. 279, &c., although a distringas against lands and goods issued if the party failed to appear.

The summons in real actions was formerly served by attaching a copy of it to a white wand set up on the premises; and it is familiar law to practitioners who remember the former proceeding in ejectment, that personal service to change the title was not demanded

The nature or kind of service is entirely different from an utter want of service, and may be insufficient as a general course of practice, while the latter is utterly

void. As when a defendant was ordered to pay under the Court of Requests Act in England, correspondent with our Act, 13 & 14 Vict. ch. 53, secs. 91-93, it was held that if he made default he must be summoned to shew cause why he had made such default before he could be committed to confinement.—See *Abley v. Dale*, 14 Jur. 1070, citing 1 Str. 567; where it is said, “The laws of God and man both give the party an opportunity to make his defence if he has any.”

I am not prepared, then, to say as a rule of law that the service of the attaching order or of the summons upon the garnishee to shew cause why he should not pay over must be personal, and if not personal that it must be void, and be therefore set aside by the court.

Then as to the particular cases in which service not personal have been held to be sufficient:—in *Howard v. Ramsbottom*, (3 Taunt. 526) the statute required that the notice of disputing the proceedings in bankruptcy should be given to the assignees. And the court held that although service on a maid-servant at the assignees’ residence was not sufficient, yet service on the attorney was sufficient.

In *Rhodes v. Innes* (7 Bing. 329), where a father eluded personal service of process, and it was served on the son at his, defendant’s residence, who on being told what it was said he would give it to his father, who was in the house: held, this was good personal service of the process, under the statute, which required personal service. *Tindal, C. J.* says, “There is no magic in the word personal, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient.” This case must be considered as very much qualified, if not overruled by the cases of *Gogg v. Lord Huntingtower* (1 D. & L. 599), (*Christmas v. Eicke* (6 D. & L. 156), *Russel v. Lowe* (2 Dowl. N. S. 233), and *Grand Junction Water Works Co. v. Roy* (16 L. J. C. P. 200).

In *The Queen v. the Justices of the North Riding of Yorkshire* (7 Q. B. 154), the statute provided that an appeal from a conviction of justices might be brought by the party “first giving or causing to be given to the surveyor or surveyors, or to such justice or other per-

son by whose act such person shall think himself aggrieved, notice in writing of his intention," &c. It was held that service of such notice at the dwelling-house of the justices, though not personal, was sufficient, although it was urged the appeal affected them as to costs, and as to their liability to an action of trespass, and that it did not appear the notice had ever come to their hands.

In *Mason v. Muggeridge* (18 C. B. 642), service of a judge's order for the defendant to appear and be examined as to debts due to him, &c., was held not sufficiently made by serving the wife, without shewing that it had since come to the defendant's knowledge, and the attachment was refused. But this was because the process was to procure an attachment if default were made.

In *Warwick v. Bacon* (7 M. & G. 961), service of a rule to compute on a clerk of defendant at the defendant's counting-house, held, not sufficient, the usual and proper course being to serve at the dwelling-house all rules which need not be personally served.

In *Rowland v. Vizetelly et al.* (6 M. & G. 723), a rule to compute served "on a clerk or servant of the defendants at their warehouse," was held insufficient. Maule, J., says, "Service on a domestic servant at the defendant's place of residence is held sufficient, on the ground that it is the servant's duty to receive papers and letters left there for his master, and to deliver them to him. That may not be the case with respect to this clerk."

I am not quite prepared to say that the service of the attaching order was well made by serving a clerk at the store, and even at the residence of the garnishee, without shewing that the order had subsequently come to the knowledge or hands of the garnishee, or without shewing some excuse why a service on the garnishee was not made, or was not made on some member of the garnishee's family at his dwelling-house. For all that appears from the affidavit, the garnishee could have been served personally, in which case a better service should have been made.

As was said by Mr. Justice Williams, in *Davies v. Westmacott* (7 C. B. N. S. 829), "Every word of the affidavit

may be true, and yet the process-server might without any difficulty have ascertained the defendant's dwelling; or to apply it to this case, might without any difficulty have made a better service than was made on the clerk at the garnishee's store and residence.

I think I should, if the application had been duly made, have held that this affidavit did not show sufficient facts to constitute the service made a good service, without holding that it was absolutely necessary the service should have been a personal service.

But this objection arises not directly, but incidentally, upon the summons to pay over, after one attorney has accepted service of it for the garnishee and another attorney has appeared on the return of the summons to except against the validity and effect of this summons by the attorney.

Now, as to the acceptance by the attorney of the service of the attaching order, I conceive this to have been irregular if the attorney had no authority to receive it.

The rule is, as is laid down in *Bayley v. Buckland* (1 Ex. 6), "When a defendant has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority, because, in that case, the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence; but even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms if he had a defence on the merits. If the attorney was solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so."

But although this acceptance by the attorney was on the 17th of the month, and although this matter has been several times before the Judge in Chambers, no application has yet been made by the garnishee to set aside this service. He only asserts by another attorney that the first attorney had no such authority as he has assumed to exercise, but makes no affidavit of the fact.

I think, under such circumstances, I should not interfere with the act of the first attorney. This supineness of the garnishee is some evidence of actual authority in the first attorney, and he is moreover, within the language of the above decision, "guilty of negligence."

If this service stands, I think the prior *prima facie* defective service of the attaching order is cured.

But assuming that the acceptance by the attorney was irregular, does the appearance of the party by a duly constituted attorney to object to this service as cause why he should not answer the summons, cure the objection of service?

In *Levy v. Duncombe* (3 Dowl. P. C. 447), a rule nisi had been obtained by the plaintiff for an attachment against his late attorney, for not having delivered his bill of costs pursuant to judge's order, and which had been made a rule of court, and personally served.

Humfrey and Hughes shewed cause, and objected that the rule could not be made absolute, because it had not been personally served.

"Lord Abinger, C. B.—The rule nisi is served merely for the purpose of bringing the party here; if he appears, as he does here by his counsel, that obviates the necessity of enquiring whether the service of the rule was personal or not, though if no one had appeared, the court would probably not have made the rule absolute for an attachment, except on an affidavit of personal service. The contempt for which the attachment is prayed was in not obeying a previous rule, which had been personally served."

So in this case, the object of this summons was "merely for the purpose of bringing the party here," and he has appeared by counsel or attorney; and I think in such a case, although he appears to object to no service, or no suffi-

cient service, that his appearance does of itself remove the objection, and answer the purpose for which the summons was issued.

While an *essoin* or excuse for not appearing to process could be cast, it was refused to a party who was seen in court, as in the case of the secondary of the court himself claiming it, while he was actually in attendance upon the *essoin* day, wherein he *essoined*. *Anson v. Jefferson* (2 Wils. 164).

And perhaps the former course in England of declaring "by the by," may further illustrate what the effect is of a party being actually or presumably present in court.

The plaintiff in every case, and in some cases any other person who had not sued out process against the defendant at all, when the defendant has appeared, or when an appearance was entered for him, or when he was in the actual custody of the marshal, could serve a declaration against him for any different cause of action than that he had been brought into court to answer; and the reason of it was that the defendant being actually or presumably in court, there was no necessity to take out other process against him, and that being in court for one purpose, he was present for all purposes, and for every one, and not only for the plaintiff who had brought him there. *Smith v. Miller* (3 T. R. 627), *Miller v. Andrews* (5 T. R. 634), *Surlyard v. Harris* (4 Burr. 2180).

I think, then, that as a rule of law personal service is not necessary, either of the order to attach or of the summons to shew cause why the garnishee should not pay over:—

That the service, if not personal, should at any rate be shewn to have been made upon the wife, or upon some member of the family at the dwelling-house of the party, in such a manner as would have constituted good service under the old practice of the declaration in ejectment, by which the possession was sought to be changed:—

That the service in the case of the attaching order is *prima facie* not sufficient:—

That the acceptance of service of the summons to pay over by an attorney is *prima facie* sufficient:

That either of these services could have been set aside by an application for the purpose:—

That as no such application has been made, but as an attorney has appeared to shew cause against the validity of the last service, this appearance is in truth an appearance to the summons, and cures all previous defects.

But such an appearance as this must be distinguished from a substantive application, after proceedings have been taken upon the defective service, to set them aside; and from those cases where the court has held the service deficient when no cause was shewn; and also from those where a service is not denied, but it is complained of as having been made on an improper day, as a Sunday, at too late an hour, at an improper place, or while the party was in attendance upon the courts, and so privileged for the time—for in all these cases the service is admitted, but the irregularity of it is alone questioned, which is very different from a case where the effect and substance of the objection is, that no service has been made at all, and yet there is the anomaly of the party being seen in court and personally making an excuse for not being there.

Under all these circumstances I will make the order, which is, of course, subject to the correction and revision of the court.

EX PARTE GLASS, IN RE MACDONALD.

Costs—Taxation—Third parties clause—Mortgagor and mortgagee.

The mortgagees of land having brought ejectment, and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor accompanied by a statement of the amount due, in which one item was for "solicitor's costs, \$143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale.

- Held, 1. That the mortgagor was clearly a person entitled to apply for taxation within the Consol. Stats. U. C. ch. 35, s. 38.
2. That the two bills might be considered as particulars of the one item in the previous statement, and that the bill of costs in the suit drew with it the other bill, which would not alone have been subject to taxation and both bills were therefore referred.

[Chambers, March, 1863.]

The applicant, Glass, mortgaged his property to the Trust and Loan Company, with power of sale. Default was

made, and the mortgagees, by Mr. Macdonald, their attorney, brought ejectment, and then sold the land under the power, and paid the surplus purchase money to Glass, deducting their attorney's costs of the ejectment and the sale.

Mr. Macdonald sent the mortgagor a statement, now produced, of principal and interest due on the mortgage, and an item for solicitor's costs, \$143. He requested an account of the items, and received two bills, one for £10 14s. 7d., costs in the ejectment, the other £20 12s. 3d., costs of exercising the power of sale. These bills he received in March last.

In November following he obtained a summons to have the bill taxed. After some months of enlargements, the case came on for argument in Chambers, and his right to a taxation was resisted.

W. H. Burns for the applicant. S. J. Vankoughnet shewed cause.

The following cases were cited, and commented upon by both sides. *Re Phillpotts*, 18 Beav. 84; *Re Fyson*, 9 Beav. 117; *Re Dawson and Bryan*, 28 Beav. 605; *Re Loughborough*, 23 Beav. 439; *Re Abbott*, 4 L. T. Rep. N. S. 576; *Re Bingnold*, 9 Beav. 269; *In re Lemon and Peterson*, 8 U. C. L. J. 185; *Consol. Stats. U. C.*, ch. 35.

HAGARTY, J.—Before the passing of our Attorneys' Act, 16 Vic., ch. 175, now ch. 35, *Consol. Stats. U. C.*, the applicant would have no such remedy, as no sufficient privity existed between him and the mortgagee's solicitor, and his only course would have been to file a bill for an account.

Sec. 38 (taken from the Imperial Act, 6 & 7 Vic., ch. 73,) declares, that when any person, not being chargeable as the principal party, is liable to pay, or has paid any bill to the attorney, or to the principal party entitled thereto, the party so paying may make the like application for a reference thereof to taxation, and in like manner as the party chargeable therewith might himself have made, and the like proceedings shall be had thereupon as if such application had been made by the party so chargeable.

Sec. 39 allows the court or judge to consider any addi-

tional special circumstances applicable to the person making the application, although they be not applicable to the party chargeable with the bill.

Sec. 40 empowers an order to be made on the attorney, to deliver to the applicant a copy of the bill, on paying costs of the copy.

These provisions, under the name of the "third party clauses," have made an important change in the law.

I consider the present applicant comes clearly within their reach, if there be no difficulty as to the right to refer the peculiar kind of charges.

I agree with the judgment of my late lamented brother, Judge Burns, *In re Lemon and Peterson*, (8 U. C. L. J. 185,) that a bill exclusively for conveyancing charges cannot be referred in this province.

The Imperial Act, already cited, at sec. 37, gives express power to the Lord Chancellor and Master of the Rolls to order taxation of a bill, "in case no part of such business shall have been transacted in any court of law or equity." Our statute has no analogous provision, and merely refers to "business done by any attorney or solicitor as such."

In England it is common to find a petition to the Chancellor or Master of the Rolls, when there is no cause in court, to refer in a case exactly like the present. *In re Abbott*, (4 L. T. Rep. N. S. 576.)

It has, I think, always been our practice here to see if the bill contained any one taxable item, and if so then to hold, as in the language of Park, J., in *Smith v. Taylor*, (7 Bing. 263,) "one taxable item draws into its vortex all others in the same bill."

I have had some doubts as to my power to refer the bill for the costs of exercising the power of sale, as it is made out separately, but I think a liberal construction of the rule and practice warrants my considering that, although on separate sheets of paper and headed separately, the two documents, namely the ejectment costs, and the power of sale costs—are referable to the item in the statement rendered to the mortgagor "Solicitor's costs, \$143," and so I may consider them as the particulars of this item; and that as

the ejectment costs are clearly taxable, they must draw the other charges after them.

It must be understood that on the taxation the principle on which the bill is taxed is not as between the third person (*viz.*, the applicant) and the solicitor, but as between such solicitor and his own clients. See *Smith's Chancery Practice*, 7th ed., p. 134.

It is also to be noted, as laid down in the same work, page 134, that "if the mortgagee thinks fit to pay his own solicitor's bill, then, although the right of the mortgagee to charge the full amount against the mortgagor is left open, the mortgagor cannot as of course open that settlement as between the mortgagee and his solicitor. The mortgagor would not in such a case be without remedy, for in the settlement between him and the mortgagee, every improper payment made by the mortgagee to his solicitor would be disallowed, as between the mortgagee and mortgagor."

This language is taken almost verbatim from that of the Master of the Rolls in *Ex parte Bignold* (9 Beav. 271). He further says in that case: "I have often had occasion to observe, that this act in no way alters the relation between a solicitor and his client. A mortgagor has a right to have a taxation of the mortgagee's solicitor's bill, because he is liable to pay it." * * "The mortgagor cannot as of course open that settlement," (*viz.*, between the mortgagee and his solicitor,) and say, 'the matter is still open, for the bill has never been settled as between me and the mortgagee's solicitor.' The solicitor has a right to say, 'I never acted as your solicitor; I have fairly settled all matters with my own client, and am not liable to account again to you.'" I also refer to *In re Fyson*, 9 Beav, 118; *In re Gaitskell*, 1 Phil. 581; *Re Dickson*, 28 L. T. Rep. 153; *Marshall on Costs*, 217, 218.

I therefore direct a reference of these bills to be taxed by the Master of the Court of Common Pleas in which the ejectment suit was brought.

When the true amount properly taxable to the mortgagees, as between them as clients and Mr. Macdonald as their solicitor, is ascertained, the applicant can be readily advised as

to his remedy for any amount which he can prove has been unwarrantably retained by the mortgagees.

As to the bills, the statute gives me power to order them to be delivered, (sec. 40), but they have, in fact, been so delivered, and unless sufficient reason to the contrary can be shewn, I must hold them to be delivered. I presume it was on the basis of these bills the surplus for the mortgagor, after the sale, was calculated. (a)

HALL v. BOULTON.

Execution.

Under the old law (before the 20 Vic. ch. 57, sec. 10) it was sufficient to issue a writ of execution within a year from the entry of judgment, and was unnecessary also to return and file it within that time.

[Chambers, June, 1863.]

The defendant obtained a summons calling on the plaintiff to shew cause why the fi. fa. herein should not be set aside, on the ground that the judgment on which it was issued was more than ten years old, and had not been revived; and on the ground that the judgment had been satisfied by agreement and settlement between the parties, and that the execution was issued in breach of the agreement, and contrary to good faith.

The defendant filed an affidavit that the action was commenced in the fall of 1851, and a verdict obtained in October of that year for £30 15s.; that in February following an execution issued, which was in due course returned nulla bona: that though eleven years had passed since the entry of judgment, no application or order to revive the same had been made; and that the fi. fa. now moved against, and in the hands of the sheriff of the county of Simcoe, was issued and tested on the 30th of December, 1862.

The plaintiff's affidavits stated that the original writ of fi. fa. was issued and returned by the sheriff within a year and a day of the entry of the judgment; and that the said writ having been lost, a judge's order was obtained in August, 1862, allowing a duplicate to issue, to which a return was procured, and on such writ and return the present

(a) See *In re Baker*, 8 L. T. Rep. N. S. 566.

writ was issued. The supposed inability of defendant to meet the demand was alleged as the reason for the long delay.

Affidavits were filed on both sides as to the settlement mentioned in the summons, which was denied by the plaintiff; and upon that branch of the case, which it is unnecessary to report, the learned judge refused to interfere.

WILSON, J.—As to the objection to the issuing of the present execution without first reviving the judgment, the question is, must an execution under the old law be not only issued on the judgment within one year from the entry of the judgment, but be also returned and filed in the office from which it issued within that time?

If it must be so issued, returned, and filed within that period, then the present execution was irregularly issued; if it need not, then so far as the point of law or practice is concerned it is not irregular.

Under the law as it existed in England before the 15 & 16 Vic., ch. 76, sec. 128, which prevailed here before the 20 Vic., ch. 57, sec. 10, now embodied in our C. L. P. Act, sec. 301, an execution was required to be issued within the year from the entry of the judgment, but it was not necessary it should have been returned and filed within the year. The case of *Simpson v. Heath* (5 M. & W. 631) clearly settled this to have been the practice in England, and it certainly was the practice here also. I know it to have been the practice of the profession, and I am aware of the point having been decided more than once in Chambers. I know of no decision to the contrary, while the case of *Wilson v. Jamieson* (6 O. S. 481) takes this point for granted.

No question arises under the 301st section of the C. L. P. Act, before referred to, as the first writ issued many years before that Act was passed. The question of regularity therefore is to be determined by the old law, and the old law I take to be quite clearly in favour of the regularity of the proceedings.

Summons discharged with costs.

CURRY V. TURNER.

Proceedings against prisoner—Rules of Court, 98-100—Construction of.

Defendant, having been at large on bail when the verdict was obtained against him, was rendered by his bail near the end of the ensuing term, and not having been charged in execution during that term, applied for his discharge. Held, that he was not a prisoner, within the meaning of the rules of court, at the time of the trial, not having been in close custody, and the application was refused.

[Chambers, July, 1862.]

This was an application to discharge defendant from custody, on the ground that he was not charged in execution within the time fixed by the practice.

A verdict was taken for the plaintiff at the last Oxford assizes. The defendant was then out on bail. During the ensuing term of Easter, on the 26th of May, he was duly rendered by his bail, and had since remained in close custody. Judgment was not entered until the 6th of June, several days after the close of the term, and no ca. sa. had as yet issued. The summons for discharge was issued on the 1st of July, 1862.

HAGARTY, J.—Rule 99 of this province says:—"The plaintiff shall proceed to trial or final judgment against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment." This rule is exactly the same as the English rule of 1853.

The decision turns, in my mind, on the point whether this defendant can be considered a prisoner within the meaning of our rules. I have arrived at the conclusion that inasmuch as he was at large on bail when the trial took place, and was not rendered until near the end of the ensuing term, this application must fail. It seems clear to me, from a perusal of Rules 98, 99, and 100, that "prisoner" means an actual prisoner, and not a man delivered to bail to certain sureties. The words of the 98th rule speak of an order of a judge "directing the discharge of a defendant out of custody, upon special bail being put in and perfected."

In Robinson and Harrison's Digest, page 50, there is a note

of an unreported case, *Jennings v. Ready*, Easter Term, 3 Vic., “where a prisoner, surrendered by his bail after judgment, applies for a supersedeas, the plaintiff not having charged him in execution in due time, he must shew when notice of render was given.” *Thorne v. Leslie*, (8 A. & E. 195); *Borer v. Baker*, (2 Dowl. P. C. 608); *Baxter v. Bailey*, (3 M. & W. 415): in these cases it seems clear that it was only from render that defendant was considered a prisoner under the rules.

The English practice may be found in Chitty’s Archbold, 1155, 10th edition.

Had the defendant been rendered in the vacation before Easter Term, a different question would have arisen, on the authority of *Borer v. Baker*.

I discharge the summons without costs. (*a*)

MOODY V. DOUGALL.

Time for setting down demurrers—Right to renew application in Practice Court.

A demurrer was set down by the plaintiff, before the opening of the court on the first day of Michaelmas Term, for argument on the second paper day, and afterwards, about twelve on the same day, it was set down by the defendant for argument on the first paper day. During the same term, in Practice Court, a rule to strike out the demurrer entered by defendant was discharged, on the ground that the plaintiff’s entry was improperly made before the court had met. The court, however, heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the court.

A motion in Practice Court in Easter Term following to rescind the discharge of the previous application there, was refused, as being contrary to established practice, but without costs, as the learned judge who made the first order wished it to be moved against, and if possible rescinded.

[Practice Court, E. T., 1863.]

During Easter Term Morphy obtained a rule calling on the defendant to shew cause why the rule granted in the Practice Court in this cause, on the 21st day of November last, should not be rescinded, on the ground that the same was made through misapprehension of the practice of the court, in supposing that the court required demurrers to be set down for argument in court whilst the court was sitting,

(a) See *Brash v. Latta*, 6 U. C. L. J. 226.

and that they could not be set down before the court opened; and why the demurrers set down for argument by the defendant in this cause should not be struck off the files; or why the terms of the rule should not be varied, so that the defendant should be deprived of the costs of the said rule; and that the plaintiff should be allowed all costs in respect of the demurrers so set down by him, on the further ground that the said demurrers of the defendant were so set down for argument by him after the plaintiff had set down his demurrers for argument.

On obtaining the rule the plaintiff filed affidavits to the effect that on the first day of Michaelmas Term last the plaintiff, after ten o'clock, a.m., and before the court met, set down the demurrers in this cause for argument on the second paper day of the term: that about twelve o'clock, noon, the defendant set the demurrers down for argument on the first paper day of the term: that during the term the plaintiff obtained a rule calling on the defendant to shew cause why the demurrers set down for argument by him should not be struck out of the paper, because they were so set down after the same demurrers had been set down by the plaintiff: that that rule was discharged, with costs to be costs in the cause, by the learned judge who sat in the Practice Court, on the ground that the proper time to set down demurrers was while the court was actually sitting, and not before; but that the case was argued on the day for which the plaintiff had set the demurrers down to be heard, the court declining to hear the argument on the day for which the defendant had set them down.

The learned judge who sat in the Practice Court expressed a desire that the rule moved against should be rescinded, as the full court and all the judges, after considering the matter, thought the plaintiff was regular, and had the right to set down the case before the court actually opened.

During the term R. A. Harrison shewed cause, and contended that although the full court might review the decision of a judge in Chambers, yet when the same judge

was sitting in the Practice Court his judgment could not be reviewed by the full court, and if not, then it could not be reviewed by another judge sitting in the Practice Court. He referred to Consol. Stats. U. C. ch. 10, sec. 9, as shewing that the decisions of the Practice Court had the same binding effect as those made by the full court; that though the court might during the same term perhaps revise or alter a rule granted during the term, it could not do so after a term had elapsed, and the rule had issued. He also objected that even if the power of revision clearly existed, as in case of a judge's order, it would not be exercised, as the application had not been made in the next term after the order or rule complained of was made. He also contended that the materials on which the original rule was moved for ought to be produced on this application. He referred to *Meredith v. Gittens*, 21 L. J. Q. B. 273; *Orchard v. Moxey*, 21 L. J. Ex. 79, note; *Collins et al. v. Johnson*, 16 C. B. 588; Rule of Practice, No. 15; *Harrison's C. L. P. Act*, 597; *Notman v. Rapelje*, 6 O. S. 560.

Morphy, contra, contended, as to the materials on which the original rule was moved not being produced, that it appeared by affidavit filed on moving this rule that search had been made in the proper office for these papers, and they could not be found: that the learned judge who sat in the Practice Court having himself expressed a desire that the rule should be rescinded, the court ought to exercise the power of varying its own rules: particularly as it was in a matter in which costs alone were at stake. He referred to *Shaw v. Nickerson*, 7 U. C. R. 541, as shewing that a judge in Chambers has authority to alter his own decision, and a fortiori the court.

RICHARDS, J.—Without establishing a precedent that would, in my judgment, be very inconvenient, and contrary to the established practice of the courts in England for very many years, I do not think I can make this rule absolute. The observations of Baron Parke, in *Dodgson v. Scott*, (2 Ex. 458), seem to me to apply to the case before us. He says, "The first point is, is it competent for me to entertain

this application at all, the objection being that it has been already disposed of in such a way as, according to the established practice of this court, to preclude any further enquiry? Several cases were cited to shew to what extent the courts have gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further enquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited, and I presume it to be the practice of the other courts also. The practice appears not to have been first adopted but sanctioned by a rule of the Court of Queen's Bench of Hilary Term, 3 Jac. 1, by which it was made highly penal if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that upon the principle that where there had been a judgment upon the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties, because they have held a party equally bound when the rule which he has obtained was discharged, although he himself, the counsel for the party obtaining the rule, was never heard." He then refers to several cases, and proceeds, "in all of which the rule was recognized, that if there has been an application to the court, and the matter has been disposed of by the court, the parties will not be allowed to re-agitate the same matter."

In *Leggo v. Young*, (17 C. B. 549), the court adhered to the rule, and in a note very many authorities are referred to.

In *Orchard v. Moxey*, (2 E. & B. 206), where a point in relation to costs was brought before a judge in Chambers, he thought the matter in his discretion, and refused the costs. Subsequently the Court of Common Pleas decided that the judge had no discretion, that decision being contrary to one previously made in the Exchequer. The plaintiff then renewed his application for full costs, which came before the court. Coleridge, J., said: "You have taken the decision.

of a judge at Chambers, and have let two terms pass without disturbing it." It was urged that the delay occurred under the belief that the judge in Chambers, according to the decision of the Exchequer, had a discretion, but that it was since shewn that construction of the statute was disputable. Coleridge, J., added, "Suppose all that was done at Chambers had been done here, we should not now hear you." Lord Campbell, C.J., observed, "Could the unsuccessful parties in the two cases in the Exchequer apply to that court now, or could the party who failed in the Common Pleas take that course, if we should agree in opinion with the Court of Exchequer?"

Todd v. Jeffery, (7 A. & E. 519,) is an authority on most of the points raised in this case. In Trinity Term, 1836, a rule was made absolute in the bail court, by Coleridge, J., to enter a nonsuit. After that term, the plaintiff applied to Coleridge, J., at Chambers, for liberty to move the full court to revise his judgment given in the bail court. The learned judge, after taking time to consider, said that, under the circumstances, the plaintiff might have liberty to make such application, if the full court thought proper to entertain it. On arguing the rule nisi, Lord Denman, in giving judgment, said, "The decisions in the bail court are like decisions here. This court will alter its own rules where there has been a plain misconception. But that is not so here; and where a judge sitting in the bail court has actually decided a case, even a doubt expressed by him cannot justify us in altering his decision after the term in which it was given." Patterson, J., said, "We must, for the sake of all concerned in the administration of justice, consider a rule made in the bail court in the same light as if it were made here; and if the rule in question had been made here, we could not alter it after the term in which it was made, unless there had been some palpable mistake."

I do not understand that the misconception referred to by Lord Denman or the mistake by Mr. Justice Patterson, means a misconception or mistaken view as to the law of the case, or of the practice of the court, but rather as to some fact in relation to the form of the rule, or the grounds upon

which it was argued. In one case, where it was made to appear that the facts, as stated in an affidavit on which the court acted, were false, and the party making the affidavit has been indicted for perjury, and had probably absconded, the court re-opened the question, and rescinded the former rule. *Rex v. Eve*, (5 A. & E. 780.)

I think, on the authority of the decided cases and the reasoning applied to them, to which I assent, that I am precluded from interfering with the rule moved against from want of authority so to do, particularly as this rule was moved in Easter Term, and the one moved against was granted in Michaelmas Term last, and in time to have been moved against in the same term, Michaelmas Term ending on 29th of November last.

As, however, the learned judge who ordered the rule in the Practice Court wished this motion made, and desired, if possible, that the rule should be made absolute, and as the defendant had insisted on his strict legal right to have the rule discharged, I will discharge the rule without costs.

I do not think allowing the rule moved against to stand will, after all, be of much practical disadvantage to the plaintiff, as it merely discharges an application to strike out the demurrer books set down by the defendant from the paper. It does not necessarily imply that the master will allow the defendant the costs of setting down the case or of the demurrer books, particularly after the decision of the full court on the subject, and he will no doubt feel quite justified in considering the plaintiff's case as properly set down.

Rule discharged, without costs.

DENNISON v. KNOX.

Certiorari.

Where the plaintiff, pending an issue in law, removed the case by certiorari from the County Court to the Queen's Bench, and defendant refused to enter an appearance after notice, an order to compel him or to assist the plaintiff to proceed was refused.

Quære, as to the plaintiff's right to remove his own cause under such circumstances.

[Chambers, July, 1863.]

Summons to shew cause why defendant should not enter an appearance in the office of the clerk of the Crown, or

why the plaintiff should not have leave to enter an appearance for him, and on service of a notice upon defendant of having entered such appearance why the plaintiff should not have leave to proceed in the action by filing a declaration and serving a copy of the same on defendant, his attorney or agent; or why in default of defendant entering an appearance the plaintiff should not be at liberty to proceed by filing a declaration, posting up a copy with notice to plead in eight days, and in default of a plea be at liberty to sign judgment; or why in default of such appearance a writ of distringas should not issue to compel such appearance.

From the affidavits and papers it appeared:—1. That on the 2nd of June, 1863, the plaintiff's attorney served the defendant's attorney with a notice entitled in the cause and in the Queen's Bench, that the plaintiff having sued out of the Queen's Bench a writ of certiorari directed to the judge of the County Court of Huron and Bruce, for removing the cause from the County Court into the Queen's Bench, had filed the writ and return with the proper officer at Toronto, and that defendant was required to appear in the said action within ten days, otherwise judgment by default.

2. That this was an action of covenant, brought for the recovery of \$200 and interest, on a covenant in a mortgage made by defendant to plaintiff, in favour of one C. B., as the assignee of the mortgage, and carried on for C. B.'s benefit: that this action was commenced in the County Court of Huron and Bruce, and defendant pleaded a set-off due by the plaintiff to defendant, to which the plaintiff replied on equitable grounds an assignment by the mortgagee, with notice to the mortgagor and his assent thereto, to which replication defendant demurred: that judgment was given for defendant with leave to the plaintiff to amend: that the plaintiff amended, and defendant again demurred: that the plaintiff removed the cause from the County Court to the Queen's Bench by certiorari, which the judge returned: that after the return the plaintiff's attorney saw defendant's attorney, who promised that he would in a few days send an appearance to Toronto to be entered, but had not done so, and had since refused and still refused, and after such refusal he was

served with the above notice. The affidavit stated plaintiff's merits in the action.

3. Defendant's attorney denied any positive undertaking to appear, stating that after the certiorari issued the plaintiff's attorney proposed to him to let the pleadings stand as they were, to which he replied he would think it over and let him know in a few days: that the plaintiff's attorney then requested him to enter an appearance, and defendant's attorney replied "he could send it at the same time as the pleadings:" that defendant's attorney, on reflection, thought that as he had only been retained by defendant to defend the suit in the County Court, he would require his client's instructions before he entered a defence in this court, (Queen's Bench), and he shortly afterwards informed the plaintiff's attorney that he declined entering into the proposed arrangement: that the plaintiff's attorney threatened to bring ejectment against defendant on the same mortgage unless an appearance was entered, and had brought such action.

R. A. Harrison supported the summons.

T. Moss contra.

DRAPER, C.J.—The removing by a plaintiff by certiorari of his own cause from the County Court, pending an issue in law not tried, and possibly pending issues in fact, for the affidavits disclose only that a set-off is pleaded and replied to, is a novel proceeding, so far as my experience goes, and no instance of a similar course has been brought under my notice. Conceding (for the sake of argument only) the right of a plaintiff to remove his own cause by certiorari at any stage, it appears to me to be a course open to grave objections, and to which I should afford no facilities. It certainly is not of right that the plaintiff should obtain a judge's order in effect to point out to him what course he must now take to get on with his action, or in effect to relieve him of the responsibility of taking a step, by forcing the defendant to appear. It is unreasonable for the court or a judge to compel an appearance, the result of which may expose defendant to loss and expense, when the defendant has no desire to liti-

gate the matter with the plaintiff, but leaves him to pursue his remedy in such mode as the law authorizes.

I do not think the plaintiff makes out a case of an undertaking by defendant's attorney to appear. The request was not made until after the writ of certiorari had been sued out, and when not improbably the plaintiff's attorney felt in difficulty as to how he should get on, and the plaintiff's attorney neither took a step nor forbore taking one in consequence of the alleged undertaking. If the defendant appears to the certiorari, I do not perceive what remedy he has for his costs in the court below. He could not, in any way that occurs to me, compel the plaintiff to proceed, though the plaintiff may obtain a procedendo, notwithstanding he issued the certiorari; at least I see no obstacle to his doing so. It is obvious that if this course is allowed it may harrass defendants, and might be used as a mode of appealing from the opinion of a judge before judgment was actually given, instead of following the practice directed by the statute in regard to appeals.

I think no ground is shewn to make my granting the order prayed for a matter of right, and as a matter of discretion I feel very clear I ought not, in the absence of any authority to do it. If the plaintiff's course of proceeding has the sanction of law, he must take whatever step he is advised to carry on his cause. If by law he cannot, without some special and discretionary interference of the court or a judge, get the defendant into the Court of Queen's Bench, he must make a much stronger case than his affidavits shew to entitle himself to this aid. I confess I look upon this as an experiment, to which I am not inclined to give any encouragement.

Summons discharged, with costs. (*a*)

(*a*) See *Edwards v. Bowen*, 5 B. & C. 206; *Melsome v. Gardner*, Cowp. 116; *Hankey v. Grand Trunk R. W. Co.*, 17 U. C. R. 472; *Kempe v. Balne*, 8 Jur. 619; *Gunn v. Mackhenry*, 1 Wils. 277.

MCLEAN v. EVANS.

*Taxation of costs—Service of subpoenas—Witnesses paid by both sides
—Witnesses not called.*

Semble, that subpoenas being mesne process, under sec. 277 of the C. L. P. A., no fees can be allowed for mileage or service, if not made by the sheriff.

Where witnesses are subpoenaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other.

Where witnesses are subpoenaed but not called, the master should decide whether they were necessary or not, and allow or refuse their expenses accordingly.

[Chambers, June, 1863.]

Application to revise costs taxed by defendant, the grounds for revision being: 1. That the Master has taxed the costs of services of subpoenas made by a person who is not the sheriff or deputy sheriff or bailiff.

2. That some of the witnesses for the defendant were paid both by plaintiff and defendant, and that the defendant should be required to get his money back from the witnesses, and not be allowed to tax them against the plaintiff: and,

3. That the fees of those witnesses who were not examined by the defendant at the trial should not have been taxed; and that the Master refused to decide upon the materiality of the witnesses for whom the defendant was claiming an allowance.

WILSON, J.—I think section 277 of the C. L. P. Act determines the first point, because a subpoena is mesne process, as I stated yesterday during the argument, and as the following definition of it from Blackstone's Commentaries clearly shows: "Mesne process is such process as issues pending the suit upon some collateral matter, as to summon juries, witnesses, and the like, distinguished from original process which is founded on the writ. Mesne process is also sometimes put in contradistinction to final process, or process of execution, and then it signifies all such process as intervenes between the beginning and end of a suit." 3 Com. 279.

The section of the C. L. P. Act, applicable to this case, sec. 277, enacts:—"In the taxation of costs no fees shall be allowed for the mileage or service of writs of summons or

other mesne process, unless served and sworn in the affidavit of service to have been served by the sheriff, his deputy or bailiff, being a literate person, (or by a coroner, when the sheriff is a party to the suit), nor unless a return of the sheriff or coroner (as the case may be) be endorsed thereon, except in cases as provided in the eighteenth section of this Act."

The tariff of costs, to which also I was referred, and which provides for the allowance to the attorney for service of writs, &c., when not done by the sheriff and when taxable to the attorney, has relation to the 18th section of the C. L. P. Act under which the attorney may, on the default of the sheriff for fifteen days, have service made for him by any literate person.

If any of the services of subpœnas, therefore, were not made by the sheriff, his deputy or bailiff, or are not so sworn to in the affidavit of service, "no fees" (as the statute says) "shall be allowed for the mileage or service in the taxation of costs."

As to the second point, that the master has allowed to the defendant the expenses of those witnesses alleged to have been subpœnaed by both parties and paid by both, the rule appears to be that where the witness is subpœnaed by both parties and paid by both, that party is entitled to his expenses from the other who succeeds in the cause.—*Benson v. Schreider*, (7 Taunt. 337), *Allen v. Yoxall*, (1 C. & K. 315.)

As to the third objection, I think there should be a reference to the master, for the master should decide not only whether the judge rejected the witnesses or not, but whether they were necessary or not.

In *Galloway v. Keyworth*, (15 C. B. 230), *Jervis, C.J.*, says, "Where the judge at nisi prius rejects a witness, right or wrong, the Master never allows for his attendance." Again, "If the cause had been tried in the usual course, and the judge had rejected *Armstrong's* evidence, you could not have had the costs." To which *Mr. Atherton*, the counsel, assented, saying, "No doubt that is so, whether the decision of the judge is right or wrong." *Maule, J.*, says, "The

court does not sit strictly as a Court of Appeal from the decision of the master. Costs of increase are allowed at the discretion of the court, but that discretion is, for convenience sake, exercised through the Master. The court has still an original jurisdiction. You may now urge that the expense of the witness' attendance ought to have been allowed, on the ground that he was a material witness." All the judges then *seriatim* concur in this ruling as to the witness' fees both when rejected by an arbitrator or by a judge.

But the expenses of witnesses will be allowed, though not called at the trial. *Ch. Arch. Prac.* 11th ed., 512. In *Miller v. Thomson*, (4 M. & G. 260,) where a plaintiff did not call a witness because the defendant failed in his plea, yet he was allowed the fees of the witness; and see also *Adamson v. Noel*, (Ch. 200,) where it is said the court will not review the Master's taxation when he has allowed for witnesses who were not called; but this must mean where the Master has entertained an objection to their allowance, and has decided that in his opinion they were material.

See *Delisser v. Towne*, (1 Q. B. 333,) in which it was decided that where the plaintiff does not prove certain assignments of perjury set out in his declaration, he should not be allowed the costs of those witnesses who were summoned to answer a case which it was supposed the defendant would attempt to make out.

The order should, then, in my opinion, go for a revision upon the first and third grounds of objection; but as the practice in the Masters' offices has been to allow for such services as have been complained of in the first objection, it would not be right that I should unsettle the practice in this respect. It will be better, therefore, that the defendant should carry his objection to the full court, that it may be more naturally considered there and definitely settled, and I will grant the order only upon the third ground.

LATTA V. WALLBRIDGE.

Award—Motion to set aside or refer back refused—Set-off.

On motion to set aside or refer back an award, it was alleged that the sum of \$122 had been twice charged against the plaintiff, being identical with a judgment also allowed against him, and that since the award he had discovered a certain note which tended to prove this; and the arbitrator certified that in his opinion the matter should be re-opened, as he was not sure that this was not the case. It was objected also that the judgment was improperly allowed, having been recovered against the plaintiff and another, and therefore not admissible as a set-off.

In answer, the mistake was denied, and it was shewn that the identity of the two sums had been a point expressly in dispute before the arbitrator, and that the judgment had been recovered on a note made by the plaintiff, and endorsed by the other defendant in the suit upon it for his accommodation. It was sworn also that the plaintiff was insolvent. The application was refused.

Quære, whether under the circumstances the judgment was not properly allowed by the arbitrator as a set-off.

[Practice Court, E. T., 1861.]

Jellet obtained a rule calling on the defendant to shew cause why the award made in this cause should not be set aside, on the following grounds:—

1. That the arbitrator allowed a judgment recovered in the County Court of Hastings, wherein the present defendant was plaintiff, and the present plaintiff and one Gilbert Latta were defendants, to form the subject of set-off in this action.

2. Or why the award should not be referred back to the arbitrator for re-consideration as to the item of \$122.27 mentioned in such award, or the item charging the plaintiff with the balance of the said judgment, or both such items on the grounds that the sum of \$122.27 was not a proper charge against the plaintiff, he having retired the note out of the defendant's hands, and paid the same to him, after he had taken the same up from the bank; and that the judgment aforesaid was between different parties than those in this action, and could not be set-off, and therefore that the balance of judgment was improperly charged against the plaintiff: that the said sum of \$122.27 and the said judgment represent the same debt; and because the award was contrary to evidence.

And because new evidence had been discovered, and the note which the defendant retired with the said sum of \$122.27 was now in the plaintiff's hands, found since the arbitration

closed; and on the ground that the arbitrator considered it ought to be referred back.

The arbitrator in his certificate stated that in his opinion the matter should be again opened, because he was not sure that the judgment charged in the award made against the plaintiff was not based on a debt identical with the defendant's cheque mentioned in the award: (viz., the \$122.27). In other words, he was apprehensive that the plaintiff had in his award been charged twice with the same liability.

The affidavits filed on behalf of the plaintiff were with a view of shewing that the judgment and the \$122.27 did in fact represent the indebtedness arising out of the same transaction, and ought not both to be allowed. The plaintiff further stated that he had since found a note which was mislaid at the time of holding the arbitration, which he thought would aid materially in establishing the view of the case contended for by him.

Robert A. Harrison shewed cause, and contended that as to the judgment allowed by way of set-off, it was recovered in an action under our provincial statute, on a promissory note made by the plaintiff and endorsed by his brother, and the plaintiff's counsel admitted and considered before the arbitrator that it should be allowed as a set-off to the plaintiff's claim for whatever balance was due on the judgment: that although the plaintiff's counsel did, before the arbitrator finally closed his award, withdraw his consent, yet as the debt was the debt of the plaintiff alone, and defendant swore he was insolvent, the court would not set aside or refer back the award on that ground. As to the referring back the award to the arbitrator, on the ground of mistake, as to allowing both the \$122.27 and the balance on the judgment—that the court would not refer back on the ground of a mistake, unless it appeared perfectly plain that there was a clear mistake, and that the discovery of new evidence is very rarely allowed as any ground for setting aside an award; that the evidence given before the arbitrator, and considered by him, fully justified the award, and that, although the arbitrator, on being applied to and told of new evidence,

might consider it desirable to re-open the case, such a practice would be very inconvenient, and the court had always ruled against it; that this case ought not to be referred back, unless the court was prepared to set aside the award on the grounds suggested by the plaintiff.

He referred to *Glen v. Grand Trunk Railway Co.*, 2 P. R. 377; *Phillips v. Evans*, 12 M. & W. 309; *Fuller v. Fenwick*, 3 C. B. 705; *Faviell v. Eastern Counties Railway Co.*, 2 Ex. 344; *Doe dem. Oxenden v. Cropper*, 10 A. & E. 197; *Leggo v. Young et al.*, 16 C. B. 626.

In moving the rule absolute Jellett referred to *Paterson v. Howison et al.*, 2 U. C. R. 139.

RICHARDS, J.—The notes of evidence before the arbitrator and the affidavits shew clearly that the question was raised and discussed before the arbitrator, as to whether the cheque or payment of \$122.27 and the judgment were really for the same indebtedness, and the arbitrator did undoubtedly decide against the plaintiff. Since the award the plaintiff has discovered a note not produced before the arbitrator, which, if he had had it before the arbitrator, would have strengthened the view he pressed on him. On this being brought to the knowledge of the arbitrator, he does not say, as in *Burnard v. Wainwright*, (19 L. J. Q. B. 423, S. C. 1 L. M. & P. 455,) that if the discovered document had been produced it would have materially affected the decision of the arbitrator, but that he is not sure his decision is right. and for that reason the case ought to be referred back.

The later cases certainly do not seem to favour the view of setting aside or referring back a matter to an arbitrator even when the mistake is clearly shewn. But in this case both parties do not admit a mistake. The plaintiff endeavours to shew that there is a mistake, whilst the defendant positively denies it.

The case of *Phillips v. Evans* (12 M. & W. 309) seems quite as strong as the one now under discussion. There the arbitrator had omitted, by mistake, to notice the sum of £119 7s. 4d. acknowledged to have been levied by defen-

dant on the plaintiff's goods, and the affidavit stated that on the error being pointed out to the arbitrator he admitted there appeared to be a mistake, and regretted he could not rectify it, his authority having expired with the publication of the award. He recommended the parties to consent to the matter being again brought before him, but the defendant refused to do so, and the court refused to set aside the award. In referring to *Hall and Hinds* (2 M. & G. 847), where the award was set aside, Rolfe, Baron, said, "There it was done because, without controversy, a mistake had been committed by subtracting one sum from another, instead of adding them both together, and awarding for the plaintiff instead of the defendant;" and Alderson, Baron, observed, "If we were to enter into the question of merits on affidavits, in nine cases out of ten it would be argued there was some mistake." Baron Parke, in giving judgment, said, referring to *Hall and Hinds*, "I do not mean to say that the decision of the Court of Common Pleas in that case was not correct, as it was founded on facts which shewed a clear mistake; but I feel extremely unwilling to enlarge that rule. Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to enquire into the merits, or we shall have to do so in almost every case."

Most of the cases on the subject of setting aside awards for mistake and improper finding of arbitrators were referred to in *Hodgkinson v. Fernie et al.* (3 C. B. N. S. 189), and nothing in that case would seem to warrant the extending the rule, as to setting aside this award, as contended for by the plaintiff. It is also an authority to shew that awards will only be referred back on the same grounds that would formerly have justified their being set aside.

I am not prepared either to set aside or refer back the award on the ground that the arbitrator has made a mistake in awarding as to the \$122.27 and as to the judgment both in favour of defendant, or on the ground of the discovery of the new evidence.

As to the award being bad because the arbitrator allowed

the judgment to be set off against the plaintiff's claim, I am not willing to yield to the plaintiff's views on that point, for many reasons, amongst others, that it clearly appears that the note on which the judgment was based was the individual note of the present plaintiff given for an individual debt, which he himself had incurred, and on which the other defendant in this suit was an endorser for his accommodation. At the arbitration his counsel admitted it was a proper subject for set-off in that proceedings, and I am by no means prepared to decide that the judgment under our statute so far merged the individual liability of defendant on the note and under the judgment as to prevent its being allowed by the arbitrator as a set-off under this reference. If I had fully made up my mind in favour of the plaintiff as to the merging of the individual liability in the judgment, I should still hesitate to set aside this award on that ground, for truly, as the arbitrator says, in equity and good conscience the amount ought to be set off against any claim the plaintiff may have against defendant.

The defendant shews in his affidavit that the case was repeatedly adjourned by the arbitrator, at the request of the plaintiff, and that he has been obliged to pay thirty dollars for the arbitrator's fees when taking up the award, and if the matter is referred back he will be put to more expense, and that, as the plaintiff is insolvent, he can get nothing from him. Under these circumstances, he contends that the case ought not to go back to the arbitrator as for the discovery of new evidence; that having taken as much time as he chose in bringing the matter before the arbitrator, if he neglected to search amongst his papers for the document he has found since, he ought not to be allowed to wait until he found the arbitrator had decided against him and then bring the matter up again.

On the whole, I am not prepared to make the rule absolute on any of the grounds taken by the plaintiff. If defendant, after the matter has been fully considered, is advised that he can enforce the award, and the plaintiff considers that from anything that appears on the face of it he can legally resist the payment of the amount thereby directed to be

paid, he will have an opportunity of doing so when the defendant attempts to enforce the award against him. In the meantime the rule will be discharged with costs.

Rule discharged.

IN THE MATTER OF ARBITRATION BETWEEN INGERSOLL
AND ELWOOD.

Arbitration—Misconduct—Undue haste—Reference back ordered.

The question referred to arbitration related to partnership accounts, &c., said to be intricate, and to require much consideration. The award was made by two or three arbitrators, and directed that one party should pay the other \$5 in full of all sums due on account of the purchase of his interest in the business, but it contained no provision that the person paying should receive a power of attorney to collect the debts, &c., nor the other provisions proper in such cases. On motion to set aside or refer back, it appeared that the award was made more hastily than it would otherwise have been, owing to a mistaken impression that the time could not be enlarged. One of the arbitrators who concurred in the award made an affidavit, filed in moving the rule, that he believed the sum was too small and the award inequitable, and it was sworn that on the same evening he had said it ought to be \$250; but he afterwards made another affidavit, used on shewing cause, that he believed the award was just as likely to be correct as if it had been for \$200.

Held, that under these circumstances it could not be said that this arbitrator had fully considered or really pronounced judgment on the questions submitted, and the matters were referred back.

[Practice Court, E. T., 1861.]

In Hilary Term J. B. Read obtained a rule on behalf of Ingersoll, calling on Elwood to shew cause, within the first four days of Easter Term, why the award between the parties should not be set aside or referred back to the arbitrators, on the following grounds:—

1. That the arbitrators who made the award exceeded their authority, in directing that each party should execute mutual releases of all debts, bonds, mortgages, accounts and reckonings, for or by reason of any bargain or sale in any way releasing to the interest or stock of the said Ingersoll & Elwood, in the St. Mary's iron foundry, as in the award directed.

2. Because the award does not express the intention or

meaning of both the arbitrators who executed it, as to the amount which of right should be paid to Ingersoll by Elwood, nor the intention or meaning of a majority of the arbitrators to whom the matters were referred under the reference.

3. On account of the misconduct of the arbitrators who executed the award in making the same too hasty, and without affording the arbitrator Ford a reasonable time or opportunity to investigate the matters referred, properly to deliberate thereupon, with a view to decide what the award between the parties should be.

4. Because the award was executed by the arbitrators who signed the same, or by John Sparling, under a mistake and misapprehension of law, in supposing that the arbitrators had no right to enlarge the time making their award beyond the day on which it was made, or by the said Sparling, or both the said arbitrators, labouring under a mistake in supposing that the time for making the award could not be enlarged beyond the day at which it was made, unless all the arbitrators joined in the enlargement.

5. Or why so much of the award as comes within the first objection, as to the excess of authority, should not be set aside.

The submission was by indenture, dated 10th November, 1860. It recites that disputes and differences had arisen between Ingersoll and Elwood, respecting divers contracts, agreements, &c., relating to matters connected with the bargain and sale of and interest in St. Mary's foundry; and in order to put an end thereto, and to obtain an amicable adjustment and final settlement thereof, the said parties had respectively agreed to refer the same to the award, final end and determination of William N. Ford and John Sparling, of St. Mary's. The arbitrators, before hearing evidence in the matter, were to appoint a third arbitrator by a memorandum in writing; and the award of any two of the arbitrators was to be final and conclusive upon both parties, the award to be made on or before the 1st of December. The parties mutually covenanted to abide by the award of the arbitrators, or any two of them, of and concerning the

premises, or anything in any matter relating thereto. The arbitrators were authorised, under their hands, or the hands of any two of them, to enlarge the time for making the award when and so often and to such time or times as they should think fit and proper; costs of the submission and reference to be in the discretion of the arbitrators, or any two of them; the submission to be made a rule of the Court of Queen's Bench.

By endorsement on the submission, signed by the two arbitrators, dated 13th November, 1860, they appointed Richard Box, of St. Mary's, the third arbitrator.

By a further endorsement, signed by all the arbitrators, the time for making the award was enlarged to the 10th of December, 1860, inclusive.

The award, under the hands and seals of John Sparling and Richard Box, two of the arbitrators, was dated the 10th of December, 1860. After reciting the submission, and that they had taken on themselves the burthen of the award it awarded of and concerning the premises:—

First.—That Elwood should pay to Ingersoll the sum of five dollars within two months from the date of the award, in full payment, discharged and satisfaction of and for all moneys, debts and duties, due or owing to the said Ingersoll by the said Elwood, on account of the purchase of the said Ingersoll's interest in the St. Mary's foundry.

Secondly.—They awarded that Ingersoll and Elwood should, on payment to the said Ingersoll by Elwood of the said sum of five dollars, seal and execute unto each other mutual releases of all debts, bonds, mortgages, accounts, and reckonings, for or by reason of any bargain or sale in any way relating to the interest or stock of the said Charles Ingersoll and John Elwood in the St. Mary's iron foundry aforesaid.

Lastly.—They awarded that Elwood should pay all the costs and expenses attending the submission, arbitration, and award, amounting to fifty-three dollars, on or before the 15th of December, 1860.

The affidavit of John Sparling, one of the arbitrators, was filed on moving for the rule. He stated that the matters in

difference referred to them were very intricate, and consisted of very many matters, accounts, documents, debts and credits, requiring much time and study to arrange and justly determine, and that owing to shortness of time, under a misunderstanding that it could not be enlarged a second time without consent of the third arbitrator, and owing to conflicting opinions of the arbitrators, a more hasty conclusion was arrived at than was just and equitable. He further stated that if the matters in difference were referred back to the same arbitrators a more full and equitable award could be made, inasmuch as he believed, upon further consideration, that the sum of \$5 was not a sufficient sum to be paid to the said Ingersoll.

The affidavit of William N. Ford, the arbitrator who did not concur in the award, was also filed on moving the rule. He stated that they could not make their award within the time mentioned in the submission, and enlarged the time for that purpose: that up to eleven o'clock at night of the last day of the time to enlarge the arbitrators had not made their award, and that owing to a misunderstanding of law further enlargement of the time was not made, and thereupon a hasty and unjust award was made by Sparling and Box, two of the arbitrators: that at about the hour of eleven, Box said to him if he would sign the award he would allow that Elwood should pay Ingersoll \$100, instead of \$5, and that Sparling at the same time said it ought to be \$250: that the award was made, as he verily believed, in great haste, and before a proper investigation was had: that he further believed if the time had been enlarged a more just award would have been made, but that through a mistake the arbitrators were of opinion that a second enlargement of time would have been unlawful. that the matters in difference between the parties were very intricate, and involved long accounts and settlements, partnership accounts and deeds, which required a long time and a strict investigation.

During Easter Term Carrall shewed cause, and filed a number of affidavits:—

1. Of John Elwood, who stated that he caused the \$5 award to be tendered to Ingersoll on the 22nd of January,

1861, and that he refused to receive the same; and that he paid the arbitrators on the 15th of December, 1860, \$53, in full of their charges, as follows: William N. Ford, \$19, John Sparling, \$19, and Richard Box, \$16.

2. Of Richard Box, one of the arbitrators, who stated that he considered the award as made just and equitable; that the intention and expressed understanding of him and Sparling in executing the award, was that Elwood should pay Ingersoll \$5, and the arbitrators the costs of the arbitration: that the arbitrators had sufficient time to make their award, as the reference was on the 13th of November and the award on the 10th of December, and he believed it would be injurious to both parties to have the matter taken out of the hands of the arbitrators.

3. Of Charles Wickham, who stated that he was a co-partner of Ingersoll and Elwood, and was conversant with the matters in difference between them referred to the arbitrators. He considered the award just and equitable. He believed the arbitrators had a sufficient length of time to make their award between the 13th of November and the 10th of December.

4. Of John Sparling, who now made another affidavit. He stated that the object, as he understood when applied to to make the first affidavit, was to have the matter referred back to the arbitrators, the matters in reference being so very intricate, involving long accounts and settlements, partnership accounts and deeds, and which required a long time and strict investigation to arrive at the facts: that the award as it now was was just as likely to be correct as if it had been for \$200: that the arbitrators had sufficient time between the 13th of November and 10th of December, but believing they knew each others' minds, and that they would arrive at about the same conclusion, they delayed consulting together and deliberating upon the evidence taken before them up to too late an hour; and when they did meet, finding they differed widely in opinion, they were so much engaged in considering and discussing the evidence, in order to arrive at a unanimous conclusion, that the question of their right further to enlarge the time for making their award did

not occur to them till within a very short period of midnight on the last lay for making the award, and then finding there was a difference of opinion as to their right further to adjourn, there was not sufficient time to take legal advice on the point: that since the making of the award Albert A. Cady, who would have been a material witness, but who was then absent in the United States, had returned, and in conversation with him he, Cady, stated that he believed the award as made by the arbitrators to be just and correct: that he, Sparling, believed it would be very injurious to both parties to have the matters disturbed or taken out of the hands of the arbitrators; and that Ford had told him it was his wish to have the matter referred back to the arbitrators.

The following authorities were referred to: Russell on Awards (1856), 410; Cox v. Gent, 13 M. & W. 364; Bowen v. Williams, 3 Ex. 93.

RICHARDS, J.—I have already considered the question of setting aside awards on the alleged grounds of mistake in the arbitrator in *Latta v. Wallbridge*, (*a*) and feel fully the difficulty of referring an award back to arbitrators on the ground that they have acted under a mistaken view of the law. But in this case there seems to me to have been sufficient misconduct, on the part of one of the arbitrators at least, to justify me in referring the matter back again. He stated that the matter in dispute between the parties required the investigation of accounts, and the consideration of difficult questions: that they were finally called upon to decide without due time for consideration; and he concurred in an award giving to one of the parties, \$5, when it appears that a short time before, on the same evening, he thought that party was entitled to \$250. And having made affidavits at the request of each of the parties, he is quite uncertain if his award is correct or not, and now thinks that the award of \$5 “is just as likely to be correct as if it had been \$200.”

Under these circumstances, I do not think this arbitrator before signing the award fully considered the matters

(*a*) Ante, page 157.

brought before him, or could be said to have really pronounced a judgment on the matters referred to him.

It may well be doubted if this award really disposed of all the matter referred to the arbitrators. If it was intended to settle partnership differences, there is no express direction who shall possess the interest in the property and effects that was formerly owned by Ingersoll, nor is the usual direction that he shall give Elwood a power of attorney to receive and collect debts, if it be intended that Elwood shall receive them or the share of Ingersoll to his own use. No objection of this kind is urged against the award, but it seems to me it would be for the interest of Elwood, if the matters in dispute were in relation to a partnership, and he is to have the share that Ingersoll possessed of the partnership property, that the award should clearly express it, and that other proper provisions should be introduced for his benefit.

It is evident the award was drawn up in great haste, without due consideration or reflection, and I cannot doubt that the wisest course for all parties is to refer it back to the arbitrators for reconsideration.

The rule will therefore be made absolute to remit back the matters by the submission referred to the arbitrators for reconsideration and re-determination, and the time for making their award on the reference will be enlarged to the first day of August next.

LYNCH ET AL., ADMINISTRATORS OF CONNELL JAMES BALDWIN, v. WILSON ET AL.

Set-off of judgments—Application to stay plaintiffs' proceedings till judgment obtained by defendants.

Defendants, as attorneys, delayed to register a mortgage to B., their client, by which the security was defeated. They then obtained another mortgage from the same mortgagor to B. on different land, subject to two prior encumbrances, and B. authorised their proceeding to foreclose this mortgage, expressly without prejudice to his rights as against them. B. having died pending a suit against defendants for negligence, his administrators obtained a verdict in it and issued execution. Defendants then applied to stay proceedings until they could obtain judgment for the costs taxed in the foreclosure suit, in order to set it off, B.'s estate being insolvent. In answer, it was urged that the second mortgage and foreclosure (which turned out of no benefit) as well as the insolvency, resulted from defendants' negligence, and that the judgment against them was the only fund to which the plaintiffs had to look for the expenses of administration, &c., for which they were personally liable.

Under these circumstances the application was refused.

[CHAMBERS, July, 1863.]

On the 24th of June, 1863, a summons was granted by the Chief Justice of Upper Canada, calling on the plaintiffs to shew cause why all proceedings in the cause, or the proceedings on the execution now in the sheriff's hands, should not be stayed until after the next fall assizes, or until judgment for the sum of £129 6s. 2d., costs taxed for defendants against the plaintiffs, be obtained, or until such other time as the judge in chambers might order, on the grounds that the defendants had a claim against the plaintiffs for the said sum for costs taxed against them, and that the estate of the late C. J. Baldwin was insolvent, and unable to pay the debts against the estate in full; and on the ground that if the proceedings were not stayed until defendants obtained judgment, and were able to set off this claim against the plaintiffs' claim in this cause, they were apprehensive they would lose the said claim; and on payment of so much of the judgment as was in excess of the said claim, or so much as the judge in chambers might direct.

It appeared from the affidavits filed on both sides, that, 1st. The present action (in which judgment had been recovered), and a writ of fi. fa. against goods was issued and placed in the sheriff's hands on the 17th of April, 1863, was brought in the lifetime of the intestate for negligence

on the part of the defendants as attorneys and solicitors of the intestate: that the action was carried on by the plaintiffs after the death of the intestate, and they recovered a verdict for \$500; that the execution now in the sheriff's hands was for that verdict and costs, amounting to \$700 or thereabouts.

2nd. That the demand of the defendants arose out of the following circumstances,—the intestate, some years before his death, sold some lands to one Duignan, and employed the defendants to draw a deed to Duignan, and a mortgage to be given by Duignan to the intestate to secure £750, the balance of the purchase money, with interest; that such deed and mortgage were drawn accordingly and executed. Duignan without delay registered his deed, but defendants delayed to register the mortgage for many months, and in the meantime Duignan gave another mortgage on the same lands for about £1,500, which was registered, and thus defeated the intestate's security, as Duignan had become insolvent; that after this second mortgage was given, one of the defendants obtained from Duignan a mortgage to the intestate on other landed estate, which was then subject to two other mortgages: that on the 11th of November, 1857, the same defendant wrote to the intestate, reserving an ulterior proposal, in reply to a note of the intestate, and proceeding thus, "In the meantime, for the benefit of all concerned, it would be well to take immediate steps against Duignan, which of course will be without prejudice to our respective positions or rights, as it will be a pity that Duignan should gain time while we are endeavouring to settle our differences. Please to advise with some professional person on the subject, and he will see you do not risk your rights by acceding to this." To which the intestate replied, through his solicitors, on the 26th of November, 1857, stating that the solicitors "advise him to comply with the suggestion contained in that letter, that immediate steps should be taken against Duignan to enforce the payment of the mortgage, it being distinctly understood that whatever steps may be taken are not to prejudice the respective positions or rights as between you and Mr. Baldwin."

Upon the receipt of this letter a bill of complaint was filed at the instance and in the name of the intestate against Duignan, and eventually a final order of foreclosure was obtained. Communications passed between the intestate and his solicitors and the present defendants during the progress of that suit, and the intestate made one or more affidavits for the purposes of the suit, but in no instance did he repudiate the authority given by him through his solicitors for the institution and maintenance thereof. No beneficial result to the intestate attended the decree, and the property on which this second mortgage was taken, and proved inadequate, as was asserted, to satisfy the previous incumbrances. It was for the costs of this suit in equity, instituted under the foregoing circumstances, that defendants claimed the rights and opportunity of set-off.

On the 6th of October, 1862, Morrison, J., made an order, in the matter of the present defendants as attorneys, that the bill or bills of costs, &c., delivered to the plaintiffs as administrator, of the intestate, Baldwin, should be referred to the proper taxing officer of the Court of Chancery to be taxed, and (among other things) that the defendants in this cause should be restrained from commencing or prosecuting any action or suit touching their demand, pending such reference, reserving the right to dispute the retainer of the defendants, and the liability of the intestate and of the plaintiffs as his administrators.

On the 15th of June, 1863, the Master in Chancery certified that, in pursuance of the order of Morrison, J., he was attended by the solicitors for the present plaintiffs and defendants, and the solicitors for the last named parties having brought in and laid before him a bill of their costs, charges and disbursements, amounting to £131 14s. 6d., he had taxed the same at £116 9s. 9d., and the costs of taxation, £3 16s. 5d., making together £120 2s. 6d., of which the defendants had received nothing.

It was asserted on both sides that the estate of Connell J. Baldwin was insolvent, and therefore the defendants represented that, unless they could set off this demand against the judgment recovered against them, they would wholly lose it.

On the plaintiffs' side it was shewn that on the 7th of January, 1863, they made a deed poll, reciting that the estate of the intestate was indebted to Paterson and Harrison in divers large sums of money, and that the plaintiffs as administrators had a claim against defendants, which was then being prosecuted, and in consideration of such indebtedness they assigned to Paterson and Harrison the said claim to the extent of Paterson and Harrison's claim for costs and professional services against the estate and the plaintiffs as administrators. The defendants were notified of this assignment on the 21st of January, 1863. On the 15th of June, 1863, Richards, J., made an order, in a cause of the Edinburgh Life Assurance Co., judgment creditors, the now plaintiffs, administrators, &c., defendants, and the now defendants, garnishees, that the garnishees should pay to the judgment creditors £25 of the debt due from them to the now plaintiffs.

It was also sworn that the plaintiffs had incurred liabilities and expenses in their administration, and that there were no assets except the verdict recovered against the defendants to reimburse them their expenses or to indemnify them against such liabilities, and that the plaintiffs, if sued by the defendants for their bill of costs, intended to resist the claim.

The plaintiffs' attorney also swore that he delayed entering the judgment in this cause, in consequence of a conversation with the defendants' attorney, from which he was led to believe the amount would be paid, and promised not to enter the judgment immediately: and that the plaintiffs' attorney attended before Mr. Justice Richards when the garnishee order was made, when the now defendants' attorney in answer to a question put, said he supposed the money would have to be paid.

DRAPER, C.J.—This application to delay the plaintiffs' proceedings on an execution in order to enable the defendants to institute an action, and to acquire a position in which they may apply to set off a judgment to be recovered by them against the plaintiffs' judgment, is one not founded upon a

right given by law, but is an appeal to the equitable powers of the court. It is indispensable therefore to consider all the circumstances, in order to determine whether the application rests upon an equitable foundation.

It does not appear when the defendants were first in a position to assert their claim, or whether they delayed in so doing before the 6th of October, 1862, when Morrison, J. referred their bill for taxation. From that date until the 15th of June, 1863, when the Master made his certificate, they could bring no action, and this summons was issued on the 24th of June. It is also asserted, and not denied, that if the plaintiffs had applied to a judge in equity, instead of a common law judge, to refer this bill, which is for proceedings in Chancery only, a trial of the fact of retainer by a jury would not have been necessary, and that the question would have been disposed of at once, or at least without the necessity of awaiting the assizes, and that the plaintiffs ought not therefore to be heard to complain against their proceedings being so long restrained, as it arose from a step taken by themselves. I should incline to the defendant's view so far. If there was unnecessary delay on their parts before October last, it is not shewn.

It may be inferred, and I think fairly, from the case of *Masterman v. Malin* (7 Bing. 435), that the court would grant "a brief suspension" of the proceedings on one side to enforce payment of costs, where the other side might, by the determination of a rule then pending, and which the court expressed their readiness to proceed with at once, become entitled to costs. I find no case which has gone further than this, and from the observations of counsel it would seem that unless in case of insolvency, or other special circumstances, even that relief could not be afforded. It is obvious that this is a long way from being an authority in support of the present application. The language of Gibbs, C.J., in *Philipson v. Caldwell* (6 Taunt. 176), is, as far as it goes, adverse to the defendants, though not any authority on the point at issue; nor have I found any case which affords any direct guidance for a decision.

Looking then at the facts, it appears to me that the second

mortgage would never have been taken from Duignan but for the loss of the priority of the first mortgage given by him to the intestate. The jury have in this case determined that such priority was lost by the neglect of the defendants. It may be truly said that by taking this mortgage the plaintiff had a reasonable prospect of being secured in the payment of Duignan's debt to him, but it does not appear that the intestate was aware of the necessity for this step, nor that he sanctioned it before it was taken; and it is obvious that it was for the defendants' interest to obtain security, since to whatever extent it proved averable they so far reduced their liability in damages to the plaintiffs for their neglect.

The necessity for the second mortgage arose from the defendants' omission in regard to the first. The necessity for the foreclosure suit arose from the same cause, and the costs of that suit are what the defendants first of all seek to obtain judgment for against the intestate's estate, and then to set off against the plaintiff's judgment for that negligent omission; and the special circumstances relied on to support the application, is the insolvency of the intestate's estate. It is urged, and if true, as appears to me, with irresistible force, that the deficiency in the assets has arisen from the defendants' conduct, and the total loss of the debt due by Duignan: that the retainer is fully open to question; that the verdict against the defendants is the only fund which the plaintiffs have to pay the expenses of administration, for which they are personally liable, and that it would be unjust under the circumstances to relieve the defendants by a proceeding beyond any decided case, and which would occasion loss to innocent parties.

Without reference to the assignment, because I do not feel driven to rely upon it, but preferring the broad ground that the defendants' case is not one which entitles them to the equitable relief asked for, I therefore discharge the summons with costs.

Summons discharged with costs. (*a*)

(*a*) See *Young v. Gye*, 10 More 198; *Johnston v. Lakeman*, 2 Dowl. P. C. 646; *Taylor v. Cook*, 1 Younge 201; *O'Hare v. Reeves*, 13 Q. B. 659.

CARVETH V. GREENWOOD.

Return by sheriff to a writ of replevin, that the property had not been since the delivery of the writ to him in the possession of defendant, or any person for him—Attachment as for an insufficient return refused with costs—Remarks as to the propriety of such return, and the sheriff's duty under the circumstances.

[PRACTICE COURT, E. T., 1860.]

Donald Bethune obtained a rule, calling on the sheriff of the united counties of Northumberland and Durham to shew cause why an attachment should not be issued against him for his contempt, in not returning the writ of replevin in this cause, or for making an insufficient return thereto, pursuant to the rule.

A side bar rule was issued and served on the sheriff on the 17th of May last, requiring him to return the writ of replevin within six days, issued by the plaintiff for replevying the schooner "Defiance," and detained by the above-named defendant. The writ of replevin was returned to the office of the Deputy Clerk of the Crown, with the following endorsement thereon:

"The property within directed to be replevied hath not been, since the delivery of the within writ to me, in the possession of the defendant, William Greenwood, or any person for him. The answer of"

(Signed by the sheriff.)

The affidavit of the plaintiff was filed, stating the issue of the writ in the cause to obtain possession of the schooner "Defiance," and that he gave a bond, with two responsible sureties, to the sheriff, for three times the value of the schooner: that he went with his attorney to the sheriff, and demanded to be put in possession of the schooner, on the 8th of May, and handed him the bond and the affidavits of justification of his sureties: that he went to the wharf at Cobourg on the same day, where the schooner was lying, and the sheriff refused to put him in possession, and refused to execute the writ, making no objection to the sufficiency of the sureties, or to the bond: that he was the owner of the "Defiance," by virtue of a mortgage made by William Garrett, of Port Hope (the registered owner), to one James Falconer, who assigned to him, both mortgage and assignment being

registered at the custom house: that the mortgage was past due: that on the 16th of April, Robert Maxwell, a coroner, seized the schooner under a fi. fa. out of the Queen's Bench, at the suit of McLeod and McIntyre, against the goods and chattels of the sheriff, Fortune, William Garrett, Henry H. Marmion, and Dalton Ulllyott, and on the 2nd of May the coroner sold the same at public auction; but before the sale, and during its continuance, he (the plaintiff) gave notice that he had the mortgage assigned to him, and claimed the schooner as his property: that the schooner was bid off at the sale by James Scott, Esquire, of Port Hope, for \$750: that the coroner, with the sheriff, Scott, and others, some four hours after the sale, went to the harbour of Port Hope, where the vessel was lying, and with force turned the captain and crew of the schooner ashore, the captain and crew then being in possession of the schooner for him: that on the 8th of May he peaceably and quietly obtained possession of the schooner, there being no person on board of her at the time, and removed her from Cobourg to Port Hope: that before obtaining such peaceable possession he sued out a writ of replevin, and lodged it in the sheriff's office at Cobourg: that on the morning of the following day the sheriff took the schooner out of his possession, although he had in his hands a writ of replevin to put him in possession: that he did not give the bond to the sheriff on the 8th of May, because he obtained possession of the schooner himself; that he was informed and believed the writ of replevin on which the sheriff acted to turn him out of the possession of the schooner was issued after dark on Monday night, the 8th of May: that he was informed and believed the coroner seized and sold the schooner by the advice and direction of the sheriff.

During the term, S. Richards, Q.C., shewed cause, and filed the sheriff's affidavit, stating the seizure of the schooner by the coroner, Maxwell, who put his bailiffs in possession, allowing, however, the crew to continue on board with the bailiff, as a matter of kindness: that the coroner put Mr. Scott, the purchaser, in possession of the schooner, without

any force or violence used towards the captain or crew, and she was thereupon brought down to Cobourg: that on Monday, the 7th of May, he, Scott, and the coroner, along with several hands of the vessel, and bailiffs of the coroner, were brought before a justice of the peace at Port Hope for taking possession of the schooner, and the magistrate bound them over to take their trial at the assizes, at their request: that while he was at Port Hope before the justice of the peace, and before he returned to Cobourg, the plaintiff came to the sheriff's office, and left the writ of replevin in this suit, but left no bond whatever, and then went down to the wharf at Cobourg, as he was informed, where the schooner was lying in charge of one Charles Elliott, for the said Scott, and then with several men went on board of her, although forbidden to do so, drew a pistol, which he presented to one George M. Goodeve, and threatened to shoot any one who would obstruct him in taking away the schooner: that the plaintiff took her away to Port Hope: that thereupon a writ of replevin was sued out by the said James Scott against the plaintiff and others for the schooner, which was placed in his hands, and on Tuesday morning, the 8th of May, he caused her to be replevied to the said Scott: attorney came, and then for the first time brought a replevin bond in this suit, and desired him to execute the writ of replevin: that he told them the defendant Greenwood was not, nor was any person for him in possession of the schooner, and that he could not execute the writ, but that if the plaintiff would take out a writ of replevin against Scott, that he would at once give him possession of the schooner thereunder. He then stated the service of the rule to return the writ, and his return thereof, as already mentioned in affidavits filed on behalf of the plaintiff.

S. Richards, Q.C., contended that the sheriff could only take the goods from the defendant: that his writ would not justify him in taking the property out of the possession of a third party; that the bond given by the plaintiff would not stand as an indemnity to the sheriff if an action of trespass were brought by the owner of the goods against him, when by

the writ he was commanded to cause to be replevied to the plaintiff his goods and chattels, describing them, and which the said defendant hath taken and unjustly detains, clearly shewing it was the goods taken and detained by the defendant that were to be replevied. He argued that if the defendant did not take or detain the goods, those being the goods which the writ directed him to replevy, the sheriff could not seize the goods taken or detained by some other party not named in the writ, and therefore he properly returned "that the property had not been in the possession of the defendant or any person for him," and he could not, in consequence, replevy it. He referred to Sewell on Sheriff, p. 540; Wardell v. Chisholm, 9 C. P. 125; Coatsworth v. Benson, Salk. 247-8, as shewing that the replevin must be by the owner against the distrainer; and to Consol. Stats. U. C., ch. 29, secs. 7 & 11.

D. Bethune, contra. The return of the sheriff neither shews the writ executed nor an excuse for not executing it. It contains a specific direction to the officer to replevy the goods, and he was bound to deliver them to the plaintiff wherever he pointed them out; and though he should point out a stranger's goods, the writ would be a sufficient justification: Sewell on Sheriff, p. 309, 401, and authorities there referred to, particularly Kelynge's Reports, p. 119, 120: that at all events, if the sheriff could take the property and deliver it to the plaintiff without committing a breach of the peace, he was bound to do so; or if there was no one on board of the vessel whilst the writ was in his hands, though claimed to be in the possession of other parties than the defendant or any one for him, yet the sheriff was bound to replevy it, and therefore his return was bad as not negating that state of facts. He also referred to the 9th and 10th sections of the replevin act.

RICHARDS, J.—The difficulty in satisfactorily determining the rights of parties under the replevin act has from time to time been referred to whenever the subject has been brought before the courts, and whether the amendment to the consolidated act by the statute of last session will render

the whole law on the subject less difficult of elucidation remains yet to be seen.

If the action be considered a personal one, and is adopted to obtain possession of property under circumstances where trover or trespass will lie, and where there has been no taking from the plaintiff by the defendant, it would seem more logical to conclude that if the goods to be replevied are not in the possession of the defendant, they cannot be taken from the possession of another who does not claim under or in privity with the defendant.

In *Anderson v. McEwan* (8 C. P. 532), the effect of the replevin act was much considered, and some of the views there discussed much in point in this case. The learned Chief Justice, in giving judgment, at page 535, says, "It might lead to gross injustice if the sheriff could take goods out of the possession of a party not named in the writ of replevin, and whom he is not directed to summon to appear and defend. Nor could such a party, so far as I can see, intervene, or appear and defend the action, while the person named as the defendant in the writ of replevin might by collusion with the plaintiff let judgment go by default. It appears to me that the legislature had such a difficulty in view, when by the sixth section of the act" (Consol. Stats. U. C., ch. 29, sec. 11), "they provided that if the sheriff shall have replevied only a portion of the goods mentioned in the writ, and cannot replevy the residue by reason of the same having been eloigned out of his bailiwick by the defendant, or by reason of the same not being in the possession of the defendant, or of any other person for him, that then he shall state in his return the articles which he cannot replevy, and the reason therefor." The Chief Justice adds, "I see no reason why the sheriff might not take such a return with regard to all the goods mentioned in the writ, as well as with regard to a portion of them."

In this case the sheriff has made his return in the words of the act, and the plaintiff asks that he shall be attached, and such return treated as a nullity. After the views on the construction of the act by the Court of Common Pleas, in which I concurred when the judgment was pronounced, and

have seen no reason to change my opinion since, I could not with propriety direct this rule to be made absolute.

In any event, on so doubtful a point, if there had not been any expression of opinion by either of the courts, I should not have felt warranted in compelling the sheriff to make a return which might expose him to an action to which the facts of the case if spread out on the return would shew he was not liable, or by compelling him to execute the writ by delivering property to the plaintiff not liable to be taking under it, and expose him to an action at the instance of the party who might have possession of the goods.

From the affidavits filed, it does not appear that the defendant Greenwood was ever in possession of the schooner. For aught that I know this may be the very case suggested by the Chief Justice of the Common Pleas, where a defendant is named who has no interest in the suit, and who would take no trouble to defend it. There is nothing to shew in any of the affidavits that he has any claim to the vessel.

If the real object of the plaintiff is to try his right to the vessel fairly, I see no reason why he may not do so in the suit brought against him to replevy the vessel at the instance of Mr. Scott. That suit of course the plaintiff will be bound to prosecute with effect, and in the event of his failing so to do, the defendant in that action, and the plaintiff in this, will have the property returned to him, or may recover its value by an action on the replevin bond.

As I do not see the necessity of this proceeding against the sheriff, even supposing the point as to the return to have been a doubtful one (as the plaintiff's right to the vessel can be settled in the replevin suit brought by Mr. Scott), in discharging the rule it must be with costs. My refusal to make this rule absolute can in no way prevent the plaintiff from bringing an action against the sheriff for neglect or breach of duty in relation to this writ, if so advised, and I have therefore less hesitation in discharging the rule than I would have had if my decision barred any of the plaintiff's legal rights.

Rule discharged.

TATE AND THE CORPORATION OF THE CITY OF TORONTO.

Garnishment.

Where several judgment creditors proceed against the same garnishee, they are entitled to be paid in the order in which their attaching orders are served, not rateably.

The sum attempted to be garnished was money awarded to the judgment debtor, of which, according to the affidavit of one of the arbitrators, a certain sum was for work done under a contract, and the remainder for damages which he had sustained by having the work taken out of his hands. Held, that as this latter portion did not become a debt until the award was made, only the attaching orders coming in after the award would bind it, not those before.

All in this court:

1. In re the arbitration between George Tate and the Corporation of the City of Toronto.
2. Sutton and Ommaney v. George Tate.
3. Tulley and Grundy v. George Tate.
4. Munroe and Grundy v. George Tate.

All in the Court of Common Pleas:

5. Lindsay et al. v. George Tate.
6. Shepherd v. George Tate and Mark Hutchinson.
7. Melling v. George Tate.
8. Whitehead v. George Tate.
9. Jack v. George Tate.
10. Hutchinson v. George Tate.
11. Nightingale v. George Tate and Mark Hutchinson.
12. Nightingale v. George Tate, Hugh Miller, and D. B. Harrison.
13. Mcclarin v. George Tate.
14. McKay v. George Tate, Hugh Miller, and D. B. Hutchinson.
15. The Bank of Montreal v. George Tate.

All in the County Court of the united counties of York and Peel:

16. Grundy v. George Tate.
17. Walton v. George Tate.
18. Playter v. George Tate.
19. Severs v. George Tate.

In the County Court of the county of Wellington:

20. Carroll v. George Tate, Hugh Miller and D. B. Harrison.

McMichael, on behalf of Thomas Nightingale, in Trinity Term, 26 Victoria, obtained a rule entitled in the above causes, calling upon the above-named plaintiffs, judgment creditors, to shew cause why the money paid into this court on the 15th of July, 1862, by the Corporation of the City of Toronto, garnishees, to the credit of the cause firstly above-named, under the order of Burns, J., dated 5th July, 1862, should not be paid to the attaching creditor, Thomas Nightingale; or so much as would satisfy his two judgments in the causes above named in which he is plaintiff; or why the above-named plaintiffs, judgment creditors, should not be first paid the amounts of their judgments in the cause thirdly above named out of the said money, under the terms of an agreement dated the 29th of May, 1861, of another agreement dated the 3rd of June, 1861, and of another agreement dated the 18th of December, 1860, and why the balance of the said money should not be distributed as this court might think proper; or why this court should not make such distribution of the money, and order the same to be paid out to the judgment creditors, or some of them, in such amounts and order as to this court should seem fit; or why the court should not make such orders and give such directions respecting the said money, and the costs of all or some of the judgment creditors, as to the court might seem best: upon reading the order of Burns, J., and the papers filed in the above-named causes in Chambers, and filed in support of the application, and on grounds disclosed therein and in the papers filed.

This rule has been enlarged from term to term, and was now brought on.

It appeared that on the 13th of June, 1862, Morrison, J., granted a summons, entitled in the original cause of Tate v. The City of Toronto, calling on the plaintiff, Tate, to shew cause why the corporation should not have leave to bring into court the sum of \$5,645, being the amount said to be awarded to Tate, together with the sum of \$1,550 claimed by the arbitrators as the expenses of the arbitration and the award, in order that the sum of \$5,645 might be

paid out under the direction of the court to the different judgment creditors of Tate, who had obtained summonses or orders to attach the said sum in the hands of the said corporation as garnishees, or taken proceedings under the garnishee enactments, as the court might think fit; and that the claim of the arbitrators might be referred to the proper officer to be taxed, and the amount when taxed be paid to the arbitrators under the order of this court, and that the corporation be discharged from the operation of the said summonses, orders and other proceedings.

A copy of the summonses was served on each of the judgment creditors of Tate named in the title to the present rule.

On the 18th of June, 1862, Burns, J., made an interim order on this summons, that the corporation should deposit forthwith \$1,550 with the Master, and upon the arbitrators being notified of such deposit, that the arbitrators should file the original award with the clerk in Chambers, and thereupon that it should be referred to the Master to tax the proper fees to the arbitrators, and on such taxation to pay over the amount taxed out of such deposit.

On the 5th of July, 1862, Burns, J., made a further order, that the corporation be at liberty to pay into court the sum of \$5,645, the balance of the award in this cause, to the credit of the cause of Tate v. The Corporation of the City of Toronto, to depend, as to its distribution, upon such applications as the creditors jointly or severally might make upon the garnishment summonses sued out by Tate's creditors from the several courts, the court undertaking to hear such attaching creditors, and the creditors consenting to the court entertaining the application: the money to be paid into court forthwith: the costs on the part of the corporation of this application to be dealt with by the court, and all further proceedings in all the suits mentioned in the affidavit of service of the summons (being all the suits mentioned in the title to the rule) to be stayed until the court should have disposed of the application.

There was arbitration between the Corporation of the City of Toronto and Tate, in which an award was made,

dated the 20th of February, 1862. And the arbitrators found that there was due from the Corporation to Tate, \$6,750, out of which sum they awarded that the corporation should deduct and retain \$1,105, being the amount, with interest, of two certain bills then over due, for \$500 each, dated respectively the 2nd May, 1860, and drawn by Tate on and accepted by the Chamberlain of the said corporation, payable to the order of Mark Hutchinson, and which bills they awarded and directed that the corporation should forthwith pay; and that the corporation should pay to Tate \$5,645, being the balance of the sum of \$6,750 so found due to Tate on or before the 20th of March, 1862, which sum was in full as well of all demands under the contract between the parties as of all other matters in difference between them. And they awarded for fees of arbitration, including expenses of preparation and execution of the award, \$1,550.

Under the order of Burns, J., it was admitted that on the 15th of July, 1862, the corporation of the City of Toronto paid \$5,645 into court. It was stated by Mr. E. C. Jones, who appeared as counsel for Mark Hutchinson, one of the judgment creditors, that this amount was composed of two distinct sums, one of \$4,234.40, being for work and labour, &c., done by Tate, and \$1,410.60 for damages, called by the arbitrators "compromise."

There was among the papers a statement, sworn to be in the hand-writing of Mr. Manning, one of the arbitrators, in which the following figures appeared to represent certain matters:—

\$26,261 00, which was obviously the value shewn by the statement of all Tate's work and materials.

164 00, opposite to which was written "plant."

\$26,425 00

\$21,571 00 the total amount charged against Tate.

\$ 4,854 00

485 40 opposite to which was written, "26 months' interest."

\$ 5,339 40 " " " " "amount due."

\$ 1,410 60	opposite to which was written something in pencil, (all the rest being in ink) which might probably have been intended for "compromise," as Mr. Harrison stated, but it was not possible
_____	to assert this from looking at the writing.
\$ 6,750 00	opposite which was written, "Amount due Tate."
1,105 00	" " " " "Deduct notes payable by Chamberlain."

\$ 5,645 00	opposite which was written, "Award."

This statement was explained by Mr. Manning on his examination under oath. He swore that the \$1,410.60, was allowed by compromise between him and the other arbitrators, and, as he explained it, it was given to Tate for damages sustained by him for having the work taken out of his hands.

In Trinity Term E. C. Jones appeared to this rule for Mark Hutchinson.

R. A. Harrison for John Melling, John Shepherd, and James Lindsay and others. He stated that the work was taken out of Tate's hands by the corporation about the end of June, 1860. He also stated that the gross sum awarded was composed of two sums. He referred to an affidavit of John Turner to establish that Melling recovered judgment against Tate on the 6th of August, 1850, for £714 7s. 3d. debt, and £4 1s. 11d. costs, and the next day obtained an attaching order on the corporation. He cited *Richardson v. Greaves*, 10 W. R. 45; *Holmes v. Tutton*, 5 E. & B. 65; *Salaman v. Donovan*, 10 Ir. C. L. Rep., Appendix, 13; *Sparks v. Younge*, 8 Ir. C. L. Rep. 251; *Dresser v. Johns*, 6 C. B. N. S. 429.

Sampson appeared for Tully & Gundry, and for Thomas Gundry, in a case in the county court to which the agreement as to paying Tully & Gundry did not, as he contended, relate. In the county court suit there was an attaching order both before and after the award. In the other suit the attaching order was after the award.

Beaty appeared for Walton, a creditor by judgment in

the county court. His attaching order was so late that he admitted his client could obtain nothing unless there was a rateable distribution. He referred to Drake on Attachment, p. 455.

Tilt appeared for Jack. His attaching order was served on the 22nd of February, 1862, after the award.

Crombie appeared for the Bank of Montreal, for Monro, and for Merrick.

C. Robinson, Q.C., appeared for Whitehead.

M. C. Cameron, Q.C., appeared for Nightingale, and also for Shepherd, and he moved the rule nisi absolute and supported it.

The affidavit of John Turner, referred to by Mr. Harrison, shewed attaching orders served on the corporation as follows:

C. P. Melling v. Tate, received 10th August, 1860.

C. P. Hutchinson v. Tate, received 22nd January, 1861.

B. R. Sutton v. Tate, received 5th March, 1861.

Co. C. Severs v. Tate, received 8th March, 1861.

C. P. Lindsay v. Tate, received 9th March, 1861.

Co. C. Gundry v. Tate, received 15th April, 1861.

Co. C. Carroll v. Tate, received 29th April, 1861.

C. C. Merrick v. Tate, received 2nd May, 1861.

Co. C. Walton v. Tate, received 2nd May, 1861.

All these were received by the deputy chamberlain, John Turner, before the award was made; and since the award he received the following:

C. P. Hutchinson v. Tate, received 21st February, 1862.

Co. C. Severs v. Tate, received 22nd February, 1862.

C. P. Nightingale v. Tate, received 22nd February, 1862.

Co. C. Grundy v. Tate, received 26th February, 1862.

B. R. Tully v. Tate, received 27th February, 1862.

C. P. Melling v. Tate, received 28th February, 1862.

Co. C. Carroll v. Tate, received 3rd March, 1862.

B. R. Munro v. Tate, received 6th March, 1862.

Besides the foregoing, it was shewn that attaching orders had been served on the corporation as follows:

C. P. McKay v. Tate, served on Charles Daly, 23rd February, 1861.

C. P. McClain v. Tate, served on Assistant Chamberlain, 1st May, 1861.

C. P. Jack v. Tate, served on the Chamberlain, 22nd February, 1862.

C. P. Jack v. Tate, served on the Chamberlain, 17th May, 1861.

C. P. Whitehead v. Tate, served on the Chamberlain, 29th May, 1862.

C. P. Shepherd v. Tate, served on the Mayor and Clerk, 23rd January, 1861.

DRAPER, C.J., delivered the judgment of the court.

We have gone through the papers brought into court on this argument.

One question that has been raised is, whether each judgment creditor is entitled to be paid in full, as far as the debt due by the garnishee to the judgment debtor will go, in the order and priority in which the attaching orders were served, or whether all the attaching creditors are entitled to be paid rateably.

It appears to us that the whole reasoning of Lord Campbell in *Holmes v. Tutton* (5 E. & B. 65), is strongly in favour of the former conclusion, and particularly at page 80, where, in reference to the language of the 62nd section of the English C. L. P. Act of 1854, that the service of the order on the garnishee shall bind such debts he observes, "We construe the word bind as not changing the property or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff," in which case the first writ must be satisfied in full before a subsequent writ can have anything applied to its satisfaction. And in *Salamans v. Donovan* (10 Ir. Com. Law Rep. Ap. 13), it was held that where a judgment creditor obtains a charging order (attaching dividends of stock in the books of the Bank of Ireland), which order is duly served, the bank will be held responsible if it pay such dividends to another judgment creditor, who subsequently to the

date of the first order has obtained in a different court, not only another charging order attaching, but also an absolute order for the payment of such dividends.

According to these authorities, the first attaching order, from the time of its service, operates on the debt due by the garnishee to the judgment debtor, in like manner as a *fi. fa.* against goods operates from the moment of its delivery to the sheriff on such debtor's goods. The creditor whose execution is first has priority, and so, we apprehend, has the creditor who first serves his attaching order on the garnishee, and so on, in succession. The case of *Webster v. Webster* (8 Jur. N. S. 1047) contains some expressions apparently affecting this question, but it appears to us to rest principally on the custom of the City of London, as to one point, and as to the operation of an assignment of money before it came to the hands and possession of the garnishee.

The second question is whether the amount of the award is divisible, one part of it being for a debt due in June, 1860, the other being in the nature of damages given to the plaintiff over and above the debt actually due to him.

Mr. Manning's statement establishes that the sum was not awarded as part of the debt due to Tate by the City of Toronto under his contract, but as damages sustained by him for having the work taken out of his hands. The attaching orders could not affect anything but debts owing or accruing due to the judgment debtor by the City of Toronto when each attaching order was served; and this latter sum of \$1,410.60 did not become a debt due to Tate until the award was made, and was not affected, as appears to us, by any attaching order served before the making of the award. The attaching orders which came in after the making the award would therefore, in our view, bind the new debt in the order in which they were received.

We are therefore of opinion that a rule absolute should issue, directing the Master to ascertain the order in which the creditors of Tate, or any of them named in the rule nisi, served their respective attaching orders on the garnishees, before the date of the award, and that, out of the moneys

paid into court to the credit of this cause, he do pay the sum of \$5,339 40-100 to such creditors in the order of priority so ascertained, paying each creditor in full as far as that sum will go. And that the Master do ascertain the order in which the creditors of Tate, or any of them named in the rule nisi, served their respective attaching orders on the garnishees after the making of the award, and that out of the moneys paid into court to the credit of this cause, he pay the sum of \$1,410 60-100 to such last named creditors in the order of priority so ascertained, paying each creditor in full as far as the last named sum will go.

If any part of the sum paid into court is absorbed by a charge of commission or fees authorised by rule of court, a rateable proportion thereof is to be deducted from each of the sums of \$5,339 40-100 and \$1,410 60-100, and the balance only distributed.

SMALL V. ECCLES.

Rule moved on affidavit filed in Chambers—Discovery and production of documents.

Where a rule nisi in full court did not disclose the fact that it had been obtained on an affidavit previously used in Chambers to obtain a summons for the same purpose, and the leave of the court to take such affidavit off the files was not shewn: Held, irregular, and the rule was discharged with costs.

Plaintiff, as judgment creditor of H. & Co., had obtained a writ calling on defendant as garnishee to shew cause why he should not pay to the plaintiff a debt which he owed them, the allegation being that he had sold certain goods of H. & Co. under a chattel mortgage which they had given him, and received more than the mortgage money.

Held, that upon the affidavits set out below enough was stated to call upon defendant to shew what books he had in his possession relating to the matters in dispute.

The plaintiff also swore that he believed the defendant had received certain notes and securities in connection with the sale, some of which remained in his possession. Held, insufficient, the documents asked for not being identified or shewn to exist.

If defendant admits the possession of certain documents, but states positively, or even says he is advised and believes, that they will not support the plaintiff's case: Semble, that production will not be ordered.

In Easter Term, C. S. Patterson, for the plaintiff, obtained a rule calling upon the defendant to shew cause why he should not answer on affidavit, within such time as the

court should order, stating what documents he had in his possession or power relating to the matters in dispute in this cause, or what he knew as to the custody they or any or either of them were in, and whether he objected (and if so, on what grounds) to the production of such as were in his possession or power, on grounds disclosed in the affidavits filed.

The plaintiff's affidavit stated that he was plaintiff in a cause wherein Henry John Haycraft, and two others (naming them), were defendants, and the said Eccles was garnishee: that proceedings being taken in that cause by the plaintiff for the attachment of a debt alleged by the plaintiff to be due by Eccles to two of the said defendants, Eccles denied that he owed the said debt, and thereupon by a judge's order, dated the 25th of July, 1862, a writ was issued in this cause, calling upon Eccles to shew cause why the plaintiff should not have execution against him for such alleged debt; that on the 10th of November, 1862, an order was made, referring the matters in difference to an arbitrator: that a meeting was had before the arbitrator, on the 6th of March, 1863, attended by the plaintiff and Eccles and their counsel, and was adjourned: that the plaintiff sought to establish against said Eccles a debt for money had and received to the use of the said two defendants, the said Eccles having held a chattel mortgage from them to secure to him the payment of a debt alleged to be due from them to said Eccles, and to secure him from loss as endorser of a bill of exchange, under which said Eccles sold the goods mortgaged, and realised, as plaintiff believed, a much larger sum than was payable to him under the said mortgage, and that such sum was in the hands of said Eccles, which was the debt in question: that the said sale was conducted by one Houghton, an auctioneer, who, as the plaintiff had been informed by him and by said Eccles, rendered an account of such sale and the proceeds to said Eccles, and which account remained in his possession: that Houghton had told the plaintiff he could not give him a copy of the account, as the books containing the same were lost: that said Eccles obtained possession of the account books and other books

used in the business of Haycraft, Small & Addison, and which books had been used in continuing the same business by C. S. Small, the younger, and Robert Addison (the other partners of Haycraft), up to the time when said Eccles took possession of the goods under the mortgage: that the plaintiff had seen two of the said books, a ledger and another book, in defendant's possession, and believed that said Eccles had in his possession other books and documents relating to the business and matters aforesaid: that the plaintiff believed said Eccles received, besides the proceeds of the sale, and as part thereof, promissory notes and other securities from the purchasers at the sale, and from other customers of the execution debtors, as well as notes which had been given to the execution debtors by customers and others, and that he had received large sums of money in payment of such notes, and that some of such notes remained in his possession: that the plaintiff was advised and believed that it was material and necessary for him, in order to support his claim, to have such account-books, notes and securities produced to him, and that he would derive material support and advantage from their production.

In Trinity Term, Gwynne, Q.C., shewed cause. He filed an affidavit of Mr. Eccles, stating that the plaintiff's affidavit, on which the rule nisi issued, was filed in Chambers in March last, and used in support of a summons granted in the very same terms as the present rule, and which summons was heard and discharged by Hagarty, J., though the order was not drawn up: that deponent appeared at the arbitration and offered to be sworn as a witness, and to detail all matters and circumstances connected with the subject of this suit, but the plaintiff would not allow deponent to be sworn: that long before this proceeding was commenced deponent furnished to the plaintiff a full statement of all transactions between the firm of Small & Addison and himself, by which it appeared that deponent was not indebted to them, and deponent then and frequently afterwards offered to go through the whole matter with the plaintiff, and to produce satisfactory vouchers for deponent's discharge, which offer the plaintiff declined: that deponent had not and never had

in his possession or power any document or paper relating to the matters in dispute in this cause which would be evidence for the plaintiff in support of his pretended claim, but such documents as deponent had related principally to his discharge: that deponent had some books of account which did belong to the firm of Small & Addison, and which came to his possession under circumstances which he was willing to disclose and explain if he was examined as a witness in this cause, but the said books did not contain anything which could be evidence for the plaintiff.

C. S. Patterson, in support of the rule, cited *Scott v. Walker*, 2 E. & B. 555; *Forshaw v. Lewis*, 10 Ex. 712.

Gwynne, Q.C., contra, cited *Thompson v. Robson*, 2 H. & N. 412, S. C., 26 L. J. Ex. 367.

DRAPER, C.J., delivered the judgment of the court.

The plaintiff comes before us as the judgment creditor of Henry John Haycraft, Charles C. Small, the younger, and Robert Addison, and he has obtained and served upon the defendant an attaching order, under the 288th section of the C. L. P. Act (Consol. Stats. U. C., ch. 22). The defendant as garnishee has, upon being called upon to shew cause why he should not be ordered to pay over, denied his liability; and an order has been made that the plaintiff may proceed against him by writ calling upon him to shew cause why there should not be execution against him for the alleged debt. It is to be assumed, though it is not distinctly stated, that this writ has been served. The statute directs that the proceedings shall be the same, or as nearly as may be, as upon a writ of revivor. What proceedings were taken on this writ in the nature of pleadings does not appear. The order for the writ was made on the 25th of July last, and on the 10th of December following the matters in difference were referred to an arbitrator, who, on the 6th of March, 1863, was attended by the parties and their counsel, but the plaintiff not being prepared with the necessary evidence the reference was adjourned. On the 20th of May last, in Easter Term, a rule issued calling on the defendant to answer upon affidavit what documents he had in his possession or power relating to the matters in dispute in this cause, or what he

knows as to the custody they or any of them are in, and whether he objects, and if so on what grounds, to the production of such as are in his possession or power.

The plaintiff states in his affidavit that he seeks to establish that defendant is indebted for money had and received to the use of C. C. Small, junior, and Robert Addison, the defendant having held a chattel mortgage from them to secure payment of a debt due by the firm to him, and to protect him against loss as endorser or acceptor of a bill for their accommodation. This statement as to the chattel mortgage the defendant does not notice in his affidavit. The plaintiff further states that under this mortgage the defendant sold the goods and realized therefrom, as plaintiff is informed and verily believes, more than any sum payable to him under the terms of the mortgage, and that it is the overplus which is the debt in question in the cause. The defendant passes by all this allegation, by answering thus:—that before the proceeding was commenced he furnished the plaintiff a full statement of all transactions between the said firm and himself, by which it appeared that he was not indebted to the firm. The plaintiff further states that this sale of the goods was conducted by an auctioneer, who rendered an account thereof and of the proceeds to the defendant, and that owing to the alleged loss of the auctioneer's books, the plaintiff cannot obtain a copy of this account. The defendant in his affidavit takes no notice of the plaintiff's allegations in respect of this account.

As to this document—the auctioneer's account—it appears to us certainly that it may, and indeed if it be what is represented, must contain matter material to the question whether the defendant is indebted to the firm of Small & Addison for money had and received, and that it is in the possession of the defendant. Discovery of this document is not therefore wanted, but an inspection of the same, an application for which should be made under the 197th section of the C. L. P. Act. The plaintiff does not state any application to the defendant for an inspection or copy of this account.

But having thus established, *prima facie* at least, that the defendant is in possession of a document to the production of which he is entitled for the purpose of discovery or otherwise, the plaintiff, under sec. 189, is entitled to ask what documents the defendant has in his possession or power relating to the matters in dispute, and to have the defendant's answer (on affidavit) to the enquiry. But an order to produce or to inspect is not the object of the application. When the defendant has answered on affidavit as to what documents he has, &c., and admits that he has any, the court may make such further order as is just. If a defendant, admitting the possession of certain documents, denies that they will sustain the plaintiff's case, or even says that he is advised and believes they will not do so, it seems production will not be ordered. See *Peile v. Stoddart*, (1 McN. & G. 192); *Reynell v. Sprye*, (15 Jur. 1046).

The case of *Scott v. Walker*, (2 E. & B. 555) was on an application to inspect. The case of *Thompson v. Robson*, (2 H. & N. 412,) has more bearing. As to the books of Small & Addison, they are not open to the objection that their existence is not shewn, though it is at least very doubtful whether they would contain evidence against the defendant on this claim. They may do so, but the affidavit of the plaintiff does not assert it, at least positively. Enough however is, we think, stated with regard to them to call upon defendant to answer what books he has in his possession relative to the matters in dispute. Upon his affidavit it will be seen whether the court should make further order; but as to notes and other securities, the affidavit is no stronger than in *Thompson v. Robson*, where Bramwell, B., says, "It is necessary to identify the particular document asked for." This affidavit does not assert the existence of any notes or securities, but only that the plaintiff is informed and believes there are such. Pollock, C.B., says: "We cannot grant a rule calling on defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case."

There is, however, an objection taken, and the fact is shewn in the first paragraph of the defendant's affidavit. The only

affidavit produced on moving this rule nisi is an affidavit of the plaintiff, which was filed and used in Chambers for the purpose of obtaining a summons similar to the rule now before us. How the plaintiff got this affidavit off the files on which it was placed in Chambers and produced it on moving this rule is not shewn, or rather it is not shewn that the court permitted it to be done. The rule itself does not disclose that it is drawn up on an affidavit which has been already used, and such has been the practice in our courts, and it is founded on the English practice. If, as is stated in the defendant's affidavit, the summons was discharged, it is the more necessary that the attention of the court should be drawn to the fact that the rule was moved upon the original affidavit.

We consider this to be irregular, and though we have thought it better to examine the whole matter, indicating our views, so as to save parties the expense which might attend other applications aiming at the same result, we discharge this rule on the point of practice, and as it is on the ground of irregularity, with costs.

Rule discharged.

IN THE MATTER OF A PLAINT INSTITUTED IN THE DIVISION COURT OF THE UNITED COUNTIES OF HURON AND BRUCE, BETWEEN WILLIAM E. GRACE, PLAINTIFF, AND SAMUEL S. WALSH, DEFENDANT.

Division court—Splitting demands—Prohibition.

Plaintiff rendered an account to defendant commencing with the amount of an account rendered on the 30th of June, 1862, and continuing to the 14th of October, when the balance, after allowing a credit of \$4.25, was \$106.43. In February, 1863, he sued in the Division Court, the statement of claim commencing with the 24th of April, and ending on the 10th of October, 1862, and amounting to \$99.31. He was allowed to recover without abandoning the excess, notwithstanding the production of the larger account rendered; and in May he sued for the items included in that account, but not in the former action, and was also allowed to recover. Defendant then applied for a prohibition.

Semle, that the application should have been made in the first suit, but the point was not settled, as, after rule nisi granted, the plaintiff consented to the writ going without costs.

[Q. B., T. T. 1863.]

John Patterson applied for a rule calling on the judge of the County Court of Huron and Bruce, and the said William E. Grace, to shew cause why a writ of prohibition should not issue, directed to the said judge, to prohibit him from further proceedings in the above mentioned plaint, instituted about the 23rd of May last, on the ground that the plaintiff ought not in law to be allowed to prosecute the plaint in the Division Court.

The applicant, Walsh, gave notice in writing on the 25th of July last to the judge, and on the 27th of July last to the plaintiff, Grace, of his intention to move, on the ground that Grace split an indivisible cause of action for goods sold and delivered, in order to bring two actions.

From the affidavits it appeared that the plaintiff rendered to the defendant an account commencing with the amount of an account rendered on the 30th of June, 1862, \$27.71, and continuing on to the 24th of October, 1862, when the amount was \$110.68, and credits were given for \$4.25, leaving a balance apparently due of \$106.43. On the 13th of February, 1863, the plaintiff took out a summons from the Division Court. The statement of claim attached to the summons commenced with an item on the 24th of April, 1862. The last item was under the date of the 10th Octo-

ber, 1862, and the amount was \$99.31. The items prior to the 1st of July in this claim amounted to \$28.02½. All the other items after June 30th to October 14th corresponded exactly in description and price, except one, where there was 12½cts. more charged in the last than in the first.

When this suit was brought to trial, it was objected for the defendant that this claim was a portion of a larger account, and the larger account was produced, and the right of the plaintiff to recover was disputed, on the ground that he was splitting his demand, contrary to the 59th section of the Division Courts Act, and that he could not maintain this suit without abandoning the balance. The judge replied that the objection could not prevail against the plaintiff in that suit, as upon the face of the claim then in court there was no appearance of the same having been divided: that the objection could only be of effect in case any future action was brought for the recovery of the difference of the account produced and that sued for; and he gave judgment for the plaintiff.

On the 22nd of May, 1863, the plaintiff took out another summons against the defendant, claiming an account of \$12. This was composed of the very same items as had been charged by the plaintiff to defendant in the account first rendered, but not included in the account first sued for, and at the foot of this claim the credits given in the account rendered, amounting to \$4.25, were also given. The plaintiff in the second action claimed \$7.75. When this came on for trial, it was objected for the defendant that the plaintiff having previously divided his claim and recovered judgment for the greater portion thereof, he must be taken to have abandoned the claim in the present action, as it was the remaining portion of the divided claim.

It was stated that the judge of the Division Court on that occasion gave judgment for the plaintiff, and on the 22nd of June, 1863, the defendant gave notice to the plaintiff that he should move to have the judgment set aside and a non-suit entered according to leave reserved, or for a new trial, setting out on what grounds the application would be made. A day was appointed to hear the parties, and the defendant

was represented by an agent, who swore that no one appeared to oppose the application, nor was it to his knowledge opposed by affidavit or otherwise, but the application was refused and the judgment ordered to stand.

DRAPER, C. J.—I entertain some doubts on this case, not that I have any doubt that this is precisely one of the very cases the legislature meant to provide for. What I am not clear about in my own mind is, whether the prohibition should not have been applied for in the first suit, for if it was made plain to the judge presiding that the plaintiff was then suing for the portion of a larger demand over which the division court had no jurisdiction, then the case should have been stopped, unless the plaintiff abandoned the excess, and if he did not a prohibition would have gone. Whether under the facts shewn it will not lie, I think doubtful. We will let the rule go, in order to hear the point argued. See *In re Aykroyd*, 1 Ex. 479; *Isaac v. Wyld*, 7 Ex. 163; *Lord Bagot v. Williams*, 3 B. & C. 235.

Per Cur.—Rule Nisi. (a).

KELLY v. HENDERSON.

Verdict subject to reference—Second verdict taken—Irregularity.

Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863; Held, that the second verdict was irregular, while the first remained, and must be set aside with costs.

[Q. B., T. T., 1863.]

In Easter Term, Robert A. Harrison obtained a rule nisi to set aside the verdict rendered for the plaintiff at the last assizes for the county of Hastings, for irregularity, with costs, on the following grounds:—1st. That in the year 1860, a verdict was taken subject to a reference, which verdict was in no manner disposed of at the time of the second trial in 1863. 2nd. That no proceeding was had in this

(a) In the following term the rule nisi was taken out and made absolute by consent, without costs.

cause for more than four terms next preceding the entry of the record in this cause in the year 1862, except a proceeding which was void, and no term's notice of intention to proceed was given before the entry of the said record. 3rd. That no notice of trial was ever given by the plaintiff or his attorney, or by any person on his behalf, to the defendant, or to any person on his behalf, for the last spring assizes for the county of Hastings, at which assizes the last mentioned verdict was rendered; or for a new trial, on grounds disclosed in affidavits and papers filed.

S. Richards, Q.C., shewed cause.

The affidavits on which this rule was granted established clearly that a verdict was rendered in this cause subject to a reference: that although the time for making the award was repeatedly enlarged by the arbitrator, and again extended by the written consent of the defendant, no award had ever been made. It did not even appear that the plaintiff obtained an appointment from the arbitrator to enter into the case. But the verdict still remained.

The affidavits filed for the plaintiff did not deny the foregoing facts; they only offered explanations for the delay, which to a great extent they attributed to defendant's repeated promises to settle, and they set forth that though no notice of trial was served personally on defendant or any one else for him, for the last spring assizes, this arose from no one being in defendant's office, and therefore the notice of trial was put under the door. But they made no allusion whatever to the assertion on the other side, that the verdict taken in this cause in 1860 had never been set aside.

DRAPER, C.J.—The authorities are conclusive on the question. Under the circumstances stated the second verdict is irregular while the first remains, unless the irregularity has been waived by both parties, which is not shewn here. *Hall v. Rouse* (6 Dowl. 656), *Evans v. Davies* (3 Dowl. 786), *Harrison v. Greenwood* (3 D. & L. 353), all sustain the defendant's contention.

Per Cur.—Rule absolute, with costs.

ALLEN v. BOICE.

Notice of trial too late—Reference at nisi prius—Time for moving.

Where notice of trial had been served too late, but the cause was entered, and referred by the judge at nisi prius to arbitration, no verdict being taken: Held, that a motion to set aside the proceedings must be made within the first four days of the next term.
[Q. B., M. T., 1863.]

C. Robinson, Q.C., on the last day of the term, applied for a rule nisi to set aside the notice of trial, and the order made by the presiding judge at nisi prius, referring this cause to arbitration, on the ground that the notice was too late, and was irregularly served upon a person as agent for the defendant's attorney; or to set aside the order of reference for irregularity, on the ground that the plaintiff obtained the same ex parte, and after the defendant had protested against the service of the notice of trial, and against further proceedings under the same.

The application had been made on the day before in Practice Court, and refused by the learned judge presiding there (John Wilson, J.) as too late, but with leave to apply to the full court.

The venue was laid in Stormont, one of the United Counties of Stormont, Dundas and Glengarry, and issue having been joined a notice of trial was on the 26th October last served on the defendant's attorney for the next ensuing assizes at Cornwall, on the 2nd of November, 1863, which was clearly too late. The defendant's attorney hearing that another notice of trial had been on the 24th of October served on Mr. Pringle, a practising attorney at Cornwall, as agent for defendant's attorney, served the plaintiff's attorney on the 31st of October with a notice that Mr. Pringle was not his agent, and that he refused to accept the service on him, and that if the plaintiff's attorney proceeded application would be made to set the proceedings aside.

The plaintiff's attorney entered his record, but no trial was had or verdict taken, but the cause was referred to arbitration by the learned judge presiding.

DRAPER, C.J.—On the foregoing facts it appears to us the motion should have been made within the first four days of this term (Michaelmas). No excuse is offered for the delay, or any suggestion for departing from the usual rule.

Per Cur.—Rule refused.

NICHOLLS V. MARY NICHOLLS, EXECUTRIX OF NATHAN NICHOLLS.

Judgment and execution—Amendment of—Right of other judgment creditors to object.

The plaintiff having declared against defendant as executrix, and obtained judgment by default, by mistake entered it and issued execution as against her in her own right, and on discovery the error obtained an order to amend the judgment roll and fi. fa. so as to correspond with the declaration. On motion to set aside this order, at the instance of other judgment creditors of defendant as executrix, Held, any fraud or collusion between the plaintiff and defendant in the suit being denied, that the applicants had no right to prevent or interfere with such amendment, and that the fact of their judgments being unknown to the judge when he made the order was immaterial.

S. Richards, Q.C., on behalf of Peter Clark, Hugh Clark, James Beachell, and Thomas Bacon, judgment creditors of defendant, obtained a rule nisi calling on the plaintiff and defendant respectively to shew cause why an order made in this cause by Adam Wilson, J., in June, 1863, ordering that the judgment roll in this cause should be amended, and also the amendments made pursuant to that order, and the writ of ven. ex. for part and fi. fa. for residue against lands, and also the fi. fa. against lands, issued on that judgment directed to the sheriff of Northumberland and Durham, should not be set aside, on the following grounds:

1. That the order and amendments prejudice the rights of other judgment creditors, namely, Peter Clark, Hugh Clark, James Beachell and Thomas Bacon, who have obtained two judgments in the County Court of Northumberland and Durham against the defendant, executrix as aforesaid, and Adam Holmes and John Butler, each of whom has obtained a judgment in the said County Court against the defendant as executrix, on all which judgments writs of execution against lands were in the sheriff's hands

before and at the time of making the order: that the order and amendments prejudice a Chancery suit mentioned in the affidavits and papers filed, instituted by one of the judgment creditors for the benefit of himself and the other creditors of the testator: that the fact that any of the said executions were in the sheriff's hands was not made known to the said judge, nor were any of the judgment creditors made parties to the application, or had any knowledge thereof.

2. That the order should not have been granted, as it prejudices the rights acquired by the judgment creditors under their executions against lands.

3. That the causes of action, or some of them, in respect of which the judgment is entered on the roll, are against the defendant personally, and not against her as executrix, and do not warrant a judgment against her as executrix.

4. That there is no sufficient writ of execution against goods to warrant the writ against lands, or the ven. ex. and fi. fa. for residue, as the writ against goods directed the amount to be made of the personal goods of the defendant, and not of the goods of the testator in her hands as executrix to be administered, and that writ does not on the face of it appear to be founded on a judgment against the defendant as executrix.

5. The fi. fa. against lands directs the amount to be levied of the lands of the defendant.

6. That the ven. ex. and fi. fa. against lands does not truly recite the preceding writ of fi. fa. against lands: that there is no writ such as is recited in the ven. ex., and no judgment warranting such a writ as is recited in the ven. ex. and fi. fa. for residue.

Or why such other order should not be made for the relief of the judgment creditors, or some of them, as to this court may seem meet on the facts.

From the judgment roll in this cause it appeared that the plaintiff declared against the defendant, "executrix of the last will and testament," &c., "for money payable by the defendant as such executrix as aforesaid, to the plaintiff for goods sold and delivered by the plaintiff to defendant as such

executrix, for money lent by the plaintiff to the defendant, as such executrix, for money paid by plaintiff to defendant, as such executrix, at her request, and for money received by defendant as such executrix for the plaintiff's use," and for money found to be due by defendant "as such executrix" to the plaintiff on accounts stated. Judgment was entered by nil dicit, that the plaintiff do recover against the defendant* the said £259 16s. 3d. The amendment made under the order was by inserting, after the word defendant, (at*) the words "as such executrix as aforesaid," and adding after the statement of the amount recovered the words following, "to be levied of the goods and chattels which were of the said Nathan Nicholls at the time of his death in the hands of the defendant as executrix aforesaid to be administered, if she hath so much in her hands, and if she hath not so much thereof in her hands to be administered, then £8 4s. 11d., being for the costs aforesaid, to be levied of the proper goods and chattels of the defendant."

This rule was granted in the Practice Court, and was made returnable here.

The affidavits in support of the application set out the proceedings in this cause, verifying by copies the original judgment roll, the amendment, and the summons and order for the amendment. Copies of the judgment rolls in the County Court and of the bill in Chancery referred to were also put in.

An affidavit of the attorney for the plaintiffs in the suit in the County Courts, stated (par. 22) that no affidavits or papers on which the summons or order moved against were founded, were found upon search with the judge's clerk in Chambers, and (par. 23) that the deponent believed that neither the judge who granted the summons nor the judge who made the order were informed of the existence of the Chancery suit, or of the recovery of the judgments in the County Court, or of the proceedings therein, and that he sincerely believed that had they been so informed the order would not have been made, and he believed there was a fraudulent concealment of these facts, or some of them, from the judge; and he stated (par. 24) that the effect of the order was to prejudice the suit in Chancery, and the

claims of the judgment creditors in the County Court, and that the plaintiff's object in obtaining the same was to defeat the recovery of these claims; and (par. 25) that he had been informed by the attorney who entered an appearance for the defendant in this suit, that he received his instructions from the plaintiff and the plaintiff's attorney in this suit, and that he never saw the defendant, and that his instructions were to enter an appearance, but to do nothing further.

The affidavits in answer stated that the Chancery suit and Butler's suit in the County Court were at an end. The plaintiff's attorney denied "fraudulent concealment," and stated his belief that the object of obtaining the order to amend was not to defeat the other claims, but to cure an irregularity in his own judgment.

He also denied giving any instructions to the attorney who appeared for the defendant, and said the defendant's attorney had assured him he made no such representation. He swore that an affidavit and exhibits attached thereto were produced on moving for and obtaining the summons: that all the proceedings in this suit were intended to be against the defendant as executrix: that the irregularities amended occurred through the mistake of a clerk, and were not discovered until a few days before the date of the order to amend.

The agent for the plaintiff's attorney, who obtained the summons and order to amend, denied "fraudulent concealment" on his part.

The plaintiff swore to the justice of the claim for which he had recovered judgment, denying any fraudulent intent or collusion between him and the defendant. He swore positively that the defendant was indebted to him as executrix, and that the action was commenced to recover that debt, and not for the purpose of defeating the rights or claims of the other creditors of the testator. He denied fraudulent concealment on his part.

Spencer shewed cause, and cited *Balfour v. Ellison*, 3 P. R. 30; *Farr v. Arderly*, 1 U. C. R. 337; *Jones v. Jones*, 1 D.

& R. 558; Perrin v. Bowes, 5 U. C. L. J. 138; Ferguson v. Baird, 10 C. P. 493; Leigh v. Baker, 3 Jur. N. S. 668.

S. Richards, Q.C., in support of the rule cited Purdie v. Watson 3 P. R. 23; McGee v. Baird, Ib. 9.

DRAPER, C.J., delivered the judgment of the court.

This rule is obtained by Peter Clark, Hugh Clark, James Beachell and Thomas Bacon, represented to be judgment creditors of the defendant as executrix of her deceased husband Nathan Nicholls.

Neither of them shew or profess to have any interest in this cause, nor yet in the order and proceedings founded thereon, against which they move, except so far as they make the judgment against the defendant in her representative character regular, and so support the execution founded thereon. The plaintiff had obtained priority in judgment and execution, but discovering a mistake in the manner in which the judgment was entered, he applied for and got an order to amend, making it right in form as against the executrix, and consistent with the statement in the declaration. If the amendment is valid, and is sustained, the plaintiff retains his priority, and his judgment will be first satisfied. The defendants assume that but for the amendment their judgments, though entered at a later date than the plaintiff's, would be entitled to prior satisfaction out of the testator's estate.

It is objected that as strangers to this cause they have no right to be heard to object to the order and what followed upon it.

The first and second objections taken in the rule are that the amendments prejudice the right of the creditors who have recovered judgments in the County Court, as well as those of the plaintiff in the Chancery suit. But these creditors have no right to be heard to prevent, and if not to prevent certainly not to annul, amendments in a suit between other parties, on the ground that without such amendments the plaintiff therein will fail in his suit against a debtor who owes all of them on different accounts. They can have no vested interest in mistakes or imperfections existing in his

suit against their common debtor, though such mistakes or imperfections, being unremedied, will be fatal to his recovery.

If fraud or collusion between the plaintiff and defendant were alleged, as where the plaintiff was thereby enabled to obtain judgment for an unfounded demand, or other creditors are misled or delayed, the plaintiff taking some advantage thereby, or other creditors are influenced and induced to take or withhold particular proceedings, or to change their position unfavourably to the recovery of their just debts, there might be found a mode to prevent the success of such frauds, though perhaps not in this form. I refer to *Harrod v. Benton* (8 B. & C. 217), and *Martin v. Martin* (3 B. & Ad. 934).

But the only ground suggested (and that more in the affidavit than in the rule) beyond the necessity of the amendment for the plaintiff's interest, and the procuring the order to make it, is an alleged fraudulent concealment of the existence of the Chancery suit and the County Court suits. We do not find it asserted in the affidavits on which the rule nisi was granted that the plaintiff was aware of these different suits; but if he was, how did it become his duty to make their existence known, and if not his duty where is the fraud in withholding the information? The affidavits filed on shewing cause deny any fraudulent concealment, at least as explicitly as it is asserted on the other side, and as to the Chancery suit, they shew it is settled. On any ground of fraud or collusion we think the case wholly fails; and that the applicants are prejudiced because the plaintiff's judgment and execution, as amended, is entitled to priority over theirs—the judgment being, as is sworn, for a bona fide debt—is no reason for our interference.

In *Purdie v. Watson* (3 P. R. 23), the Court of Common Pleas made a very similar amendment.

The other objections apply only to irregularities or informalities in the plaintiff's suit, such as a mere stranger to the cause has no right to interfere with.

We think the rule must be discharged.

We refer to *Perrin v. Bowes* (5 U. C. L. J. 138), *Balfour v. Ellison* (3 P. R. 30), *Farr v. Arderly* (1 U. C. R. 337), *Jones v. Jones* (1 D. & R. 558), *Ferguson v. Baird* (10 C. P. 493).

KELLY v. MOULDS.

Judgment on demurrer—Application to amend—Laches—Amendment refused.

Defendant being sued on a lease for not repairing, pleaded in effect that the injury was caused by the plaintiff, and in Easter Term, 1863, the plea was held bad on demurrer. In the following term he applied for leave to amend by pleading the same defence in an equitable form, in order to avoid a cross action for damages, which he swore he believed the plaintiff would be unable to satisfy. It appeared that the acts complained of by defendant were committed, if at all, about three years ago, but they were positively denied by the plaintiff and the defendant had never sued for them. Under these circumstances the application was refused.

[Q. B., E. T. 1863.]

James Boulton obtained a rule, on the second Tuesday in Trinity Term, calling on the plaintiff to shew cause why the defendant should not have leave to amend his plea pleaded in this cause, and to plead the said plea in an equitable form, as annexed. The rule was drawn up on reading affidavits and papers filed both in Chambers and on moving this rule.

The affidavit of the defendant's attorney stated that the action was brought on a lease made by the plaintiff to defendant, for money expended in repairing the demised premises: that the plea pleaded in the cause demurred to was true in substance and in fact: that judgment was given after last term for the plaintiff on demurrer to this plea, but the judgment had not been entered: (a) that a copy of the pleas desired to be pleaded were annexed to the affidavit, and such pleas were true in substance and in fact.

One of these pleas was a plea at law, and with the exception that the following words, "and the tenants and inmates thereof then and there expelled, put out and removed therefrom," were introduced immediately before the words, "contrary to the said lease," the other plea differed only from the first by inserting in the beginning the words, "And for a further plea on equitable grounds."

(a) See the decision on demurrer — *Kelly v. Moulds*, 22 U. C. R. 467.

The defendant's affidavit stated that all the repairs made upon the house by the plaintiff were rendered necessary by the illegal conduct of the plaintiff, by breaking into the house in the dead hour of the night, and abusing and expelling the tenant who rented the premises from defendant, and that in consequence of the plaintiff's conduct defendant had never been able to collect any rent for the premises for about three years past: that he desired to plead an equitable plea to prevent the necessity of a cross action: that if the plaintiff got judgment in the suit defendant would lose it altogether, as the plaintiff would not, as defendant believed, "be found in a situation to satisfy the damages," which defendant would be entitled to for the plaintiff's conduct.

Looking at the other papers, it appeared that the cause was removed by certiorari from the Division Court. The declaration was filed on the 13th of January, 1863, and was founded on a covenant by defendant to repair, and on a right reserved to the plaintiff to enter and examine, and if the premises were out of repair that defendant would after a month's notice in writing repair, or on his default the plaintiff might repair, and defendant would pay the expense thereof. To this, on the 21st of January, 1863, the defendant pleaded and on the 28th of January the plea was demurred to. Judgment on demurrer was given in the plaintiff's favour on the 15th of June, 1863. On the 27th of June the plaintiff's attorney took out a summons to be allowed to withdraw his joinder of issue in fact to the defendant's plea, and to ascertain in a summary way, pursuant to the statute, the amount for which final judgment might be entered and on the return of the summons, no one appearing to oppose it, on the 6th of July, 1863, an order was made as prayed.

An affidavit filed in Chambers by the plaintiff distinctly and positively denied the assertion, which seemed to have been made there as well as on the present application, that he broke into the house, or ill-treated the tenant, or expelled the tenant, or rendered the repairs to the house necessary.

Sampson shewed cause.

DRAPER, C.J., delivered the judgment of the court.

We gather from the affidavits that the acts charged against

the plaintiff were, if ever committed by him, committed about three years ago. This action was removed into this court, and the declaration filed last January. The defendant has therefore had ample time to sue for and recover damages for the wrongful acts of the plaintiff, but he has not up to the period of this application taken a step in such action. It appears therefore impossible, consistent with the practice and course in such matters, to delay the plaintiff's present action.

Then as to the application to amend, we do not doubt the power of the court, but that power must be exercised with discretion, and extraordinary relief ought not to be afforded where there has not been proper diligence and care on the part of the applicant, and where it is not evident that some serious if not irreparable injury will not follow.

Here the attention of the defendant was called to the badness of his plea by the demurrer on the 28th of January last. He made no effort to amend it. It was argued in Easter Term, and he allowed it to go to judgment, not asking to amend; and no one attended on his behalf when the court gave judgment against him, and consequently no leave to amend was asked for then. The truth of his plea, though sworn to by himself and his attorney, is denied. We cannot, of course, decide on which side the truth lies, but if the plaintiff having the opportunity of denying it, had not done so, it would properly have an influence on our opinion as to the facts. Then, again, if the plaintiff has done the wrong charged against him, the defendant has his remedy by cross action, so that our decision against him here does not conclude him. He may, if so advised, assert his rights.

On this state of facts we are of opinion we should be establishing a very bad precedent if we granted this rule. It has not escaped our attention, that the defendant's own affidavit, and the form of his proposed pleas, are consistent with the fact that he was not the tenant in possession when it is said the plaintiff committed the illegal acts charged against him, and expelled the tenant and inmates from the house. We think this rule should be discharged with costs.

Rule discharged.

WARD v. VANCE—THOMSON, GARNISHEE.

*Death of garnishee before order to pay—Effect of—Service of order—
Issue directed.*

A summons upon a garnishee to pay over having been opposed, the judge took time to consider, and before the order was granted the garnishee died. Held, that the delay being that of the judge, the order was not void, but might be amended, and dated as of the day of argument.

Quaere, whether in strictness all orders should not be thus dated. The executor of the garnishee having on affidavit denied the debt, and imputed collusion between the judgment creditor and judgment debtor, which was not denied, the order was rescinded, and an issue directed on payment of costs.

Adam Wilson, J., adhered to his decision in this case, ante, page 130, as to the service of the attaching order, and held that the new affidavits, set out below, rather tended to sustain such service than otherwise.

[Chambers, July 20, 1863.]

A summons was obtained by the executor of the garnishee, calling upon the judgment creditor and judgment debtor to shew cause why the order made in this matter on the 2nd of June last, ordering the garnishee to pay over to the creditor the amount of his indebtedness to the debtor, should not be rescinded on the following amends:—

1. Because the summons to shew cause, upon which the order was made, had not been personally served on the garnishee.

2. Because, at the time of the making of the order, the garnishee was dead.

3. Because nothing was due at the time.

And upon grounds disclosed in the affidavits and papers filed.

The affidavit made by Mr. Brunskill, and referred to in the summons, stated, among other things, that the garnishee died on the 25th of June, 1863: that he, Mr. Brunskill, was one of the executors of the deceased: that for about five months before his death the garnishee was chiefly confined to the house, and too unwell to attend to his business: that for some time before the garnishee's death the deponent resided chiefly at Bradford, and looked after the affairs of the garnishee, and he was well acquainted with the same: that an attaching order was taken out on the 14th of April

last ; that a summons to pay over was taken out on the 16th of June; that neither of them was personally served on the garnishee, and from statements made by him to the deponent, he (the deponent) believed the garnishee had no knowledge of the summons having been issued ; that a copy of the attaching order was handed to the deponent, but he did not accept service for the garnishee; that the summons of the 16th June, he believed was served on J. W. H. Wilson, an attorney, who had occasionally been retained to do business for the garnishee, but who had no authority to accept service of writs or papers requiring personal service; that he (the deponent) on the 22nd June, having heard of the issue of the summons, and that the judgment creditor was pressing the judge in Chambers for an order thereon, despatched a telegram to Messrs. Paterson and Harrison, his solicitors, to see Mr. O'Brien, the agent for the said J. W. H. Wilson, and to repudiate the service, which he believed was accordingly done, and a communication was made to the presiding judge in Chambers by Messrs. Paterson and Harrison that the order and summons had never been personally served; that in order to set aside the summons and service on Wilson, an affidavit was drawn up to be sworn by the garnishee, stating that no service had been made upon him, but before the affidavit arrived at Bradford the garnishee was dead: that on the 26th of June the order on the garnishee to pay over was made; that he could say with confidence the garnishee's estate was not indebted to Vance: that the judgment creditor and the judgment debtor were brothers-in-law, and he (the deponent) believed there was collusion between them.

Robert A. Harrison, for the summons, said he did not rely so much upon a want of personal service as upon an utter want of service, both of the attaching order and summons to pay over, and so contended that the order to pay ought to be rescinded. (*Abley v. Dale*, 14 Jur. 1069.) This ground he urged was open to him as being a ground "disclosed in affidavits and papers filed." He also contended that under any circumstances the summons ought to be

made absolute, because of the death of the garnishee, whereby the proceeding had abated at the time the order was made (Con. Stat. U. C., ch. 22, secs. 288, 289, 290). He admitted there was no direct authority in favour of this position, but argued that the order to pay, upon which execution might issue, was quasi judgment, and so analogous to an ordinary judgment in an ordinary action, which, if obtained after the death of either plaintiff or defendant, was at common law void.—Har. C. L. P. A. 374; note *k*. He argued that the statutes 17 Car. II. ch. 8, and 8 and 9 W. III., ch. 11, sec. 6, providing for the continuance of proceedings in an action under certain circumstances to judgment, notwithstanding the death of plaintiff or defendant, were inapplicable to garnishee proceedings. Moreover, he submitted that as the garnishee, or rather his legal representative, now really disputed the debt, the order ought, upon that ground, at all events, to be rescinded, and an issue directed, Con. Stat. U. C., ch. 22, sec. 291; *Wintle v. Williams*, 3 H. & N. 288; *Wise v. Birkenshaw*, 8 W. R. 420, S. C. 29 L. J. Ex. 240.

Tilt, contra, contended that the order was good as against the objections raised, and if not, submitted that, under the circumstances, he was entitled to have the order amended and made nunc pro tunc—*Miles v. Bough*, 3 D. & L. 105; *Lawrence v. Hodson*, 1 Y. & J. 368; *Bates v. Lockwood*, 1 T. R. 637; *Heathcote v. Wynn*, 25 L. T. Rep. 247; *Baynard v. Simmons*, 24 L. J. Q. B. 253; *Wright v. Mills*, 28 L. J. Ex. 223; *Moor v. Roberts*, 27 L. J. C. P. 161; *Lanman v. Audley*, 2 M. & W. 535; *Freeman v. Tranch*, 21 L. J. C. P. 214; *Wilkins v. Cauty*, 2 Dowl. N. S. 855; *Griffith v. Williams*, 1 C. & J. 47.

Harrison, in reply, contended that if the judgment creditor considered himself entitled to have his order amended nunc pro tunc, he should make a substantive application for the purpose, to which cause would be shewn; and that, without amendment, the application must prevail.

ADAM WILSON, J.—I do not think I ought to re-open the question of service, either of the attaching order or of the summons on the garnishee to shew cause why he should

not pay over, as I have already disposed of this point at some length, on the application being made for the final order (a); besides, the present proceedings, in my opinion, show no reason why this matter should be renewed.

Brunskill's affidavit shews that he himself—and while it would seem, he was looking after the affairs of the garnishee, during the time the garnishee was confined to the house, and was too unwell to attend to his own business—was served with the attaching order, and, it may be assumed, some short time after its issue on the 16th of April; but he does not say whether he ever informed the garnishee of the fact, although, in the nature of things, it must be assumed he did do so, and more particularly as he does not deny that the garnishee had knowledge of the order and of its service as before stated, while he does not say that, from the statements made to him by the garnishee, and from his knowledge of the garnishee's affairs, he does believe the garnishee had no knowledge of the summons. And it can scarcely be assumed the deponent, while looking after the affairs of the garnishee, could or would have neglected so serious an affair as the one in question. At any rate he is the one who can best explain whether he did communicate the receipt of the order or not, and as he does not allege to the contrary, the inference irresistibly is that he did do what he ought to have done—inform his principal of the receipt of the important paper; or, if he had not done it, that he would have disclosed the fact of such non-communication to the garnishee.

The knowledge by the garnishee of these proceedings having been initiated is of some consequence, for a less strict service or authority is required in the future proceedings or services, as would appear from the case of *Bayley v. Buckland* (1 Ex. 1).

Here it is not at all certain but that the garnishee had full and actual knowledge of the fact of there having been a summons upon him to shew cause why he should not pay over, or that, at any rate, he should be presumed to have had such knowledge.

(a) *Ward v. Vance*, page 130.

It is true that Brunskill says from his knowledge of the garnishee's affairs, and also from statements made by the garnishee, he believes the garnishee had no knowledge "of the summons having been issued," which is rather an equivocal expression. But it appears that Brunskill, from what he says, heard on the 22nd of June of the issuing of the summons. Now, from whom did he hear this? Was it from the garnishee? It is rather to be presumed it was, because Brunskill telegraphed on that day to Messrs. Paterson and Harrison, his own solicitors, to get them to have the service of the summons repudiated by Mr. Wilson's agent, and it can scarcely be assumed that he did this without the authority of the garnishee. In fact, the very act of Brunskill is made the foundation upon which the present application to set aside the service of the summons rests.

I am not inclined, therefore, to lay much stress upon the idea of there being new facts submitted in the new affidavits at all serviceable to the applicant. On the contrary, I rather think the service of the attaching order is strengthened by Mr. Brunskill's affidavit; for while before I thought the service of that order sustainable chiefly by the later proceedings then had upon it, I now think it sustainable from the circumstances connected with the present proceedings. Nor have I altered my opinion as to the effect of the appearance of an attorney to accept to a service claimed to have been made upon his client.

The first objection, therefore, I do not entertain, rather than overrule it.

The second objection is one which may, perhaps, be entitled to prevail, unless relief can be given; for the order being drawn up after the garnishee's death, can be of no efficacy in such a shape.

It is said the garnishee died after he had been called upon to shew cause why he should not pay the debt, and after the case had been argued and stood for judgment, and that the delay was the act of the judge and not of the party claiming the benefit of the order: that such delay should not prejudice the party, but that such relation should be given to the order

as it would have had if the delay in question had not occurred. It does seem reasonable that the order should be sustained, if it properly can be so, when the occasion of its not being earlier made was certainly the act of the judge, who required time for consideration as to the judgment to be pronounced, than that all that has been done towards it should be defeated by an objection which per se has no special merit in it.

The order of a judge is to be considered, while it stands, as the order of the court, and may be modified and dealt with by the judge precisely as a rule may be dealt with by the court. And I think it is quite clear that upon the particular day when an order is moved for, if the judge is not prepared to give his judgment, and takes time to consider it, if he afterwards grant the order the order may be drawn up (and perhaps, in strictness, should always be drawn up) as of the day on which it was made—*Egan v. Rowley* (8 Dowl. P. C. 145). This would be to make the order according to the actual fact, and is quite a different thing from giving it a special operation and relation, as was sought to be done in *Wilkins v. Cauty* (1 Dowl. N. S. 855).

I do not, therefore, think this order is erroneous or void as made after the death of the garnishee; but it is rather to be considered as wrongly dated, and so amendable according to the truth of the case.

Upon the third ground I have no hesitation in granting relief, and permitting the executors of the deceased garnishee to contest the alleged indebtedness to the judgment debtor, considering all the circumstances, and the very strong fact that it is the judgment debtor who is distinctly charged with carrying on these proceedings, and between whom and the plaintiff collusion is attributed, which neither of them has denied.

My opinion then is, that I should amend the order as to its date, and that I should discharge the summons so far as relates to the first and second grounds, and that I should

make it absolute, if the applicant desires it, upon the third ground, upon payment of costs. (a)

FLEURYNCK V. CLIFTON.

Arbitration—Costs—Discretion of arbitrator.

Where a cause was referred to arbitration, costs of the cause to abide the event, and costs of the reference in the discretion of the arbitrator, and an award of £4 was made in favor of plaintiff, the taxing officer refused to tax costs subsequent to the making of the award, as division court costs only, and his decision was upheld.

[CHAMBERS, 22 Victoria.]

This cause was referred to arbitration—the costs of the cause to abide the event, and the costs of reference to be in discretion of arbitrators.

The arbitrators awarded £4 to plaintiff, and that the costs of the reference should be paid by the parties equally.

Plaintiff obtained a Judge's order to enter judgment. The Master on taxation allowed the plaintiff superior Court costs on moving for leave to enter judgment, and entering judgment, &c. Defendant took out summons in Chambers to shew cause why the taxation should not be revised with costs.

BURNS, J.—The costs of which the defendant complains, viz., the entry of judgment, &c., amounting to £2 12s. 6d., are expenses incurred subsequent to the award, and incurred with a view to enforce payment of the amount awarded. They have been taxed on the scale of the costs of the Superior Courts. Defendant thinks they should have been taxed as Division Court costs only. I know of no authority which

(a) The applicant declined to take the order upon the terms of payment of costs, and so the summons was afterwards discharged with costs.

obliges the Master to adopt this lower scale of taxation, either in any Act of Parliament, or in the rule of Court; and, therefore, I decline to interfere. The defendant could easily have prevented all this by paying the award, and there would have been no necessity to apply to have it enforced. I discharge the summons with costs, as it is moved with costs.

Summons discharged.

JOHNSON V. MORLEY, ET AL., EXECUTORS OF WILLIAM
CLOUGHLY, DECEASED.

*Costs—Recovery without a trial—Rule of Trinity Term, 24 Victoria
Con. Stat. U. C., cap. 22, sec. 328.*

Semble, that the rule of Trinity Term, 24 Vic., which provides that "in any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained by a plaintiff without a trial, or in which plaintiff shall obtain execution on proceedings, in the nature of a final judgment, no more than County or Division Court costs, as the case may be, shall be taxed without a special order of the Court or a Judge, &c.," applies in the case of a cause referred to arbitration by compulsory reference to the whole costs in the action, including the costs of the reference and of the award, and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action.

Held, that under any circumstances, such is the proper construction of the order of reference in this cause, by which "the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs, in the same manner as a judge at nisi prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event."

Held, also, that where plaintiff, without a trial, recovers, in a Superior Court, an amount within the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff, so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—the 328th section, of C. L. P. Act not being applicable to such a case.

[CHAMBERS, August 4, 1863.]

The defendants obtained a summons calling on the plaintiff to shew cause,—

1. Why the Master should not revise his taxation, and tax the plaintiff's bill of costs on the Division Court scale.

2. Why he should not allow to the defendants Superior Court costs of the cause, order of reference and award.

3. And why the plaintiff should not pay the costs of the application, or otherwise, as the Judge might direct.

The affidavits and papers filed, and upon which this summons was drawn up, shewed:

1. That an action was commenced against defendants, on the common counts, for wages, for work, for money lent, and on an account stated, the particulars of demand showing claims amounting to \$632.

2. That by a Judge's order of reference, dated 20th December, 1859, the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs in the same manner as a Judge at Nisi Prius; and that the costs of the cause, award, order and reference, subject to said certificate, should abide the event.

3. That in January, 1860, an award was made in the plaintiff's favour for £20, but no certificate was granted as to costs.

4. That the Master did, on the 29th of July, 1863, tax the plaintiff's costs at £20 10s. 7d., allowing the plaintiff Superior Court costs of the reference order and award, and allowing to her costs on the Division Court scale in the cause, down to the time of the reference.

5. That the Master allowed the defendants their costs in the cause only down to the time of the reference, and did not allow to them any costs of the reference.

The copies of the bills of costs were filed with the papers.

Harman, in shewing cause, objected to the summons; that it did not shew upon what ground a revision was claimed; and that the items objected to or claimed should have been stated; and he cited *Aliven v. Furnival* (2 Dowl. P. C. 49), and *Daniel v. Bishop* (McClel. Rep. 61). And also, because it did not appear that the taxation was final, or that the Master had made his allocatur, citing *Cleaver v. Hargrave* (2 Dowl. P. C. 689). He mentioned that the rule under which the present taxation was had is the Rule of

Trinity Term, 24 Vic. [1860]. He referred to 20 U. C. R. 123, rescinding the former Rule No. 155, in Har. C. L. P. Act 661, and substituting the following in its stead:—"In any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained by a plaintiff without a trial; or in which a plaintiff shall obtain execution on proceedings in the nature of a final judgment; no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this rule shall not extend to costs in interlocutory proceedings," and contended that the Master had acted rightly in taxing the costs of the cause at the lower scale, and in allowing the plaintiff the full costs at the Superior Court scale, of all the proceedings before the arbitrator, because none but the costs of the case were within the operation of the rule. He argued that it had been so decided by Mr. Justice Burns in *Fleurynek v. Clifton* (ante p. 216). He also referred to the following English decisions: *Holland v. Vincent* (23 L. J. Exch. 78, S. C. 9, Ex. 274); *Nicholson v. Sykes* (23 L. J. Exch. 193, S. C. 9, Ex. 357).

Magrath, in support of the summons, contended that it did sufficiently appear that the Master had taxed the costs in the cause, and also what the objections were to the taxation. That the costs of the cause include the costs of the reference, referring to *Deere v. Kirkhouse* (20 L. J. Q. B. 195); *McIntosh v. Blyth* (1 Bing. 269). And, whether or not, it was unreasonable that in a case within the inferior jurisdiction, where inferior costs only are to be recovered, that the bulk of the costs should be allowed at the Superior Court scale.

ADAM WILSON, J.—The first question is, whether the case has been brought in right form before me; and the next thing is, whether the Master has determined rightly the mode of taxation.

I am not inclined to reject the application because of the

alleged insufficiency of the materials, although the case would certainly have been more complete if the summons had stated the reason why the taxation was complained of, or why a revision should be had, instead of merely stating the facts, and leaving the inferences to be drawn from them.

I think it appears that the Master has taxed the costs sought to be revised. It is so expressly sworn, but a difficulty here presents itself from the wording of the rule, which provides that "in any action of the proper competence of the Division Court, on which the plaintiff shall obtain execution on the proceedings in the nature of a final judgment, no more than Division Court costs shall be taxed, &c."

Now, it does not appear that the plaintiff either has obtained, or is desirous of obtaining execution, although the proceedings may be in the nature of a final judgment, and, no doubt, are so. He may, in strictness, proceed by action, which, although answering the purposes of an execution, is not execution. But as it is not advisable to raise any question upon this at present, I will assume that the taxation is for the purpose of obtaining an execution, and that an execution is the only process which can issue for the recovery of the money.

The reference in this case is under the 158 sec. of the C. L. P. Act, upon which judgment can be entered in the usual manner. Before the passing of this Act no such judgment could be entered unless a verdict had been taken. And, therefore, before this Act—if without a verdict the cause was referred—the plaintiff was entitled to the full costs of the suit, and of the reference, in case of an award in his favour, however small the sum awarded might be, because there were no restrictions upon his right to full costs—the statute applying to cases where a trial had been had—and the rule of Court to cases where final judgment was entered,—and neither of such provisions extending to such a case as that which I have mentioned. But, as under the amended law, final judgment may now be given upon an award made in a cause without a trial; and as such a case

is brought directly within the operation of the rule of Court above mentioned, the only question is, whether the rule does apply only to the costs of the action proper, so as still to leave the costs of the reference and award beyond its operation; or whether it does not include all the costs taxable in the action, however these costs may have been incurred.

The case of *Deere v. Kirkhouse* (20 L. J. Q. B. 195), shows that where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify from whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the action.

Holland v. Vincent (23 L. J. Exch. 78), better reported in 9 Exch. 273, shows that the costs of a reference to arbitration are not within the directions to the Masters of the Courts of Hilary Term, 16 Vic., so as to enable them to tax the costs of the reference on the lower scale, when the award is for less than £20. It is to be observed that in this case the costs of the cause were to abide the event; and the costs of the reference and award were to be in the discretion of the arbitrator.

Nicholson v. Sykes (23 L. J. Exch. 1893), maintains the preceding case.

The directions referred to are in terms not unlike our rule—that is, the particular direction, like our rule, applies to all actions—but the directions are accompanied with schedules of costs, which, by the items, are only applicable to actions and proceedings in actions. Our rule has no such restrictive accompaniment, and, no doubt, this is the reason why the Court of Exchequer determined that the directions “do not apply to the costs of reference, but only to the costs of a cause.”

The case of *Deere v. Kirkhouse* does, excepting in the point of a verdict, expressly apply to this case—for here as there “costs of the cause (award order) and reference” (subject to such certificate) are to abide the event. And I do not think that the verdict makes any substantial differ-

ence between the two cases. In each case there is a cause in court upon which, in each case, a judgment may be entered. The verdict being taken, it is true, makes the award a mere auxiliary proceeding to make that absolute which was before inchoate—the verdict, all the time, being the proceeding which is to be acted upon—but that cannot be held to be the only reason why the costs of the reference are to be considered as costs of the cause. It is more likely that it is the fact of the costs of the reference equally with the costs of the cause, being made to abide the same event of the action, which places them on the same footing as to the scale of taxation. In *Tregonings v. Attenborough* (7 Bing. 773), there was a verdict, and the costs of the reference were held to be costs of the cause. In *Taylor v. Gordon* (9 Bing. 570), there was also a verdict, but the costs of the reference were held not to be the costs in the cause, because an inquiry, quite independent of the question at issue in the cause, was opened before the arbitrator. It is not, therefore, the verdict which makes the difference. In this case, as in *Deere v. Kirkhouse*, the costs of the reference are, with the costs in the cause, to abide the event; and it appears to me then if the costs of the cause proper are to be taxed upon the lower scale, all the costs of the cause, including the reference, should be taxed upon the same scale.

I see nothing in the rule to exclude the costs of a reference as part of the proceedings in an action, and to place them on one footing, while the costs of the action proper are placed upon another. And I know of nothing to prevent the Court from regulating the costs of a reference precisely as it may regulate the costs of proceedings carried on by or before itself. References, too (by consent) are proceedings well known to, and recognized by law, as relating to actions pending in the County and Division Courts, with respect to which there are no doubt some recognized items of charges adapted to these Courts. But, whether this is so or not, there can be no reason for giving the higher costs upon any such proceedings, if the rule, as I think it does, applies to the whole costs in the action, and not only to what may strictly be called the costs of the action.

But, besides this, I am of opinion the order of reference does of itself conclude this question, for it manifestly treats the whole of these costs as costs in the cause, and as subject to the certificate of the arbitrators in like manner as they are made subject to the general event of the cause.

If I were deciding only on the rule of court, I should not interfere with the discretion which the Master has exercised, acting, as he has done, upon the opinion of the late Mr. Justice Burns, and upon decisions which do seem at first to warrant his views, but refer the defendants to the full Court to settle what the general practice should be; but as I am construing the order of reference rather than the rule, I think I ought, in this respect, to act upon my own opinion: and, therefore, I shall order the Master to revise his taxation, and to allow the plaintiff throughout the general costs (whether strictly in the cause or not) according to the lower scale; and to disallow to the defendants their whole costs in the cause proper which he has taxed to them, and not to allow to them any part of the costs of the reference, because as this is a taxation under the rule, and not under the statute, there can be no set-off in favour of the defendants.

This is the course which I think should be adopted, according to the best judgment which I can form.

I give no costs upon this application.

Order accordingly.

SHANLY (Judgment Creditor), MOORE (Judgment Debtor), CORPORATION OF CITY OF LONDON (Garnishees).

C. L. P. Act, s. 288—Garnishee proceedings—Debt due or accruing due—Salary of a physician to a municipal corporation.

A salary payable to the physician of a municipal corporation, who holds his appointment at the will of the municipal corporation, at an annual salary of \$400, payable quarterly, is neither a debt due nor accruing due within the meaning of the Common Law Procedure Act, and therefore cannot be attached at the instance of a creditor having an unsatisfied judgment against the physician.

[CHAMBERS, August 20th, 1863.]

Hector Cameron applied for an order on the summons which he had obtained in this cause, requiring the garnishees to pay over to the judgment creditor.

It appeared by the affidavits filed, that the judgment debtor was the physician for the garnishees, under a by-law appointing him to that office, and that he held such office for many years past, being yearly appointed to it by the Council, in the month of January of each year. That he is allowed a salary of \$400 per annum, which is payable in four equal payments, on the first day of January, April, July and October, in each year.

It was urged against the application that as the judgment debtor held his office only during the pleasure of the garnishees, there is that want of permanency in the office which would give the judgment creditor any claim upon the salary of the judgment debtor.

It was also urged against the application, that there was a prior order upon the garnishees to pay another judgment creditor of the present judgment debtor, which had been made by the late M. Justice Burns, under which there was still about \$300 remaining due to that creditor, and that no other sum would fall due to the judgment debtor, payable by the garnishees, during the present year of office.

Hector Cameron, in reply, shewed by affidavit that the judgment creditor in the other case referred to had received from the garnishees, on account of the order to pay, more than enough to satisfy his whole claim; but that he had voluntarily returned to the judgment debtor about \$400, or at all events a larger sum that was yet claimed to be due to that creditor, and therefore he could not claim the further benefit of that order; otherwise it might be maintained as a perpetual bar to every other creditor, and as a fraudulent protection to the judgment debtor.

ADAM WILSON, J.—Our Common Law Procedure Act authorizes a judgment creditor, upon making affidavit, among other things, that some third person is indebted to the judgment debtor, to apply to a Judge for an order that all debts owing by or accruing from such third person to the

judgment debtor shall be attached to answer the judgment (s. 288), and this is precisely the language of the English Common Law Procedure Act (17 & 18 Vic. cap. 125, s. 61).

Under the Act, not only debts which are due, but accruing due, or for which the day of payment has not arrived, may be attached; for both are equally debts, the latter being *debitum in presenti*, though *solvendum in futuro*.

A claim which is not yet reduced to a debt (as unliquidated damages) is therefore not attachable, even after verdict, but before judgment. *Jones v. Thompson* (El. Bl. & El. 63).

A superannuation allowance from the East India Company, made in favour of a clerk by a resolution of the company, and not by deed, is not such a debt as can be sued for by the clerk, and therefore it is not attachable; it is said to be a mere gratuity, and not a debt. *Jones v. The East India Company* (17 C. B. 351).

In the present case, it is desired to attach a claim which it is said the defendant has upon the city of London, as city physician, for services not yet performed. I cannot see how this is a debt. It is not like the case of money then being *debitum in presenti*—money engaged to be paid on a day yet to come—as money due on a bond, bill or note, or for goods sold or work performed: in all these cases there is the *debitum in presenti*. But how can this be said of salary or wages not yet earned, although they are being earned under an express contract? They are not yet debts, and may never become so. I do not think the object of the Legislature was to levy upon future work or service, by seizing in anticipation and contingency the consideration engaged to be paid for them. What is there to prevent the judgment debtor from releasing, or from being released, by the person with whom he has contracted, from such further or future service? Can it be said that, when such future service is attached, the judgment debtor is bound to go on and perform such service; and that the person with whom he has contracted is bound to keep him in his employment? What, if the judgment debtor will not fulfil his contract?

What, if he dies? And what, if the other party will not fulfil his contract, or dies? These considerations, I think, show very clearly that claims of this kind are not of a nature to be attached as debts, and were never intended to have been so by the Legislature.

I must therefore decline to make any order with respect to any allowance or salary dependent upon services not yet performed, and which for aught any of us can tell may never be performed, not only by reason of death or any other inevitable occurrence, but by the wilful breach of the agreement by either of the parties, or even by the express and determinate act of the parties to defeat the payment of this claim.

If an order may be granted to attach a salary or wages not yet earned, the next thing will be to claim an order for fees of office not yet accrued, or the amount of a wage not yet determined, or perhaps to attach indefinitely every claim whatever which a party may become entitled to at any period during his lifetime, until the debt is paid. Now although future rights of debtors are operated upon by some statutes, such as the Bankruptcy Acts, it is certainly under very different words from the mere authority to attach debts, which is the language of and the only purpose of this Act.

I discharge this summons, but without costs.

Summons discharged without costs.

NELSON v. ROY.

Con. Stat. U. C., cap. 22, s. 5—Teste of Ca. Sa.—Amendment.

- Held, 1. That a writ of ca. sa. tested in the name of a retired Chief Justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office, should be tested in the name of his successor.
2. That a writ tested in the name of the retired Chief Justice is an irregularity only.
3. That it may be amended upon payment of costs.

[CHAMBERS, Sept. 4th, 1863.]

On 25th July last, Draper, C.J., was gazetted Chief Justice of Upper Canada, in the room and stead of McLean, C.J., resigned.

On the same day, the Honourable Archibald McLean was gazetted President of the Court of Error and Appeal, in the room and stead of the Honourable Sir John B. Robinson, Bart., deceased.

On 10th August last, plaintiff caused defendant to be arrested under a writ of ca. sa. sued out of the Court of Queen's Bench, directed to the Sheriff of the County of Lincoln, and tested as follows: "Witness the Honourable Archibald McLean, at Toronto, the tenth day of August, in the year of our Lord one thousand eight hundred and sixty-three."

Defendant was on 14th August last arrested under the writ, and is now a prisoner thereunder in close custody in the common jail of the County of Lincoln.

Draper, C.J., though gazetted as Chief Justice of Upper Canada before the issue of the ca. sa., was not sworn in till afterwards.

Defendant thereupon obtained a summons, calling on plaintiff to shew cause why the writ of ca. sa. and the arrest of the defendant thereunder should not be set aside for irregularity, with costs, on the ground that the writ was tested in the name of the Honourable Archibald McLean, instead of in the name of the Honourable William Henry Draper, C.B., Chief Justice of the Court at the time the writ issued, and why defendant should not be discharged from the close custody in which he is now held under said writ by the Sheriff of the County of Lincoln, and on grounds disclosed in affidavits and papers filed.

The only affidavit filed was that of the attorney for defendant, wherein it was sworn that defendant was a prisoner in close custody by virtue of the ca. sa., a true copy of which was annexed; that under said writ defendant was arrested on 14th August inst., and that the Honourable Archibald McLean was not, on the day said writ of ca. sa. issued, the Chief Justice of the Court of Queen's Bench, or the senior Puisne Judge of the said Court.

Robert A. Harrison shewed cause. He argued—1. That McLean, C. J., was de facto the Chief Justice of the Court of Queen's Bench till his successor, Draper, C.J., took the

necessary oaths of office, and so accepted office. 2. That even if not so, the mistake was an irregularity only and ought to be amended. 3. That as the mistake was that of an officer of the Court, and not of plaintiff or his attorney, the amendment should be allowed without costs. He cited *Con. Stat. U. C.*, cap. 22, ss. 5, 222; *Keefer v. Hawley* (1 *Prac. Rep.* 1); *Thorp v. Hook* (1 *Dowl. P. C.* 501); *Arnell v. Weatherley* (3 *Dowl. P. C.* 464); *Billings v. Rapelje* (2 *Prac. R.* 194); *Boomer v. King* (8 *C. P.* 474); *Myers v. Rathburn* (*Tay. U. C. R.* 202); *Wilson v. Story* (3 *U. C. L. J.* 50); *Plock v. Pacheco* (9 *M. & W.* 342); *Fisher v. Brooks* (3 *O. S.* 143); *Andrus v. Page* (*Tay. U. C. R.* 348).

W. Atkinson supported the summons. He argued — 1. That McLean, C.J., could not be deemed Chief Justice of the Court of Queen's Bench after 25th July, for on that day, as "a retired Judge," and only as such he was appointed President of the Court of Error and Appeal. 2. That after 25th July, and until Draper, C.J., accepted office, there was no Chief Justice of the Court of Queen's Bench, and so there could not during that interval be any writs of *ca. sa.* 3. That the writ was a nullity, and so could not be amended. 4. That *Con. Stat. U. C.* cap. 22, s. 222, did not under any circumstances authorize amendments of final process. He cited *Con. Stat. U. C.* cap. 10, s. 8: cap. 13, s. 3; 1 *Chitty's Prac.* 11 Edn. p. 761, 765; 2 *Ib.* p. 1544; *Street v. Carter* (2 *Dowl. P. C.* 671); *Hodgkinson v. Hodgkinson* (*Ib.* 535); *Henderson v. Perry* (3 *U. C. R.* 252).

MORRISON, J., having consulted Draper, C.J., said he was of opinion that the *ca. sa.* ought to have been tested in the name of Draper, C.J., but that the omission to do so was an irregularity only, and he would therefore allow the writ to be amended. He said he thought it ought to be amended on the usual terms of payment of costs.

Order accordingly.

JOHNSTON ET AL. V. MCKENNA.

Ejectment—Judgment in favour of several plaintiffs—Death of one—Issue of habeas within a year—Issue of alias after more than six years—Necessity for revival—Execution of writ.

Held, 1st. That the death of one of two plaintiffs in ejectment after judgment (where, for all that appears, the recovery is joint, and survives), does not render necessary a suggestion of the death on the roll in order to support a writ of hab. fac. poss.

2. That where a writ of habeas was issued within one year after entry of judgment, an alias writ issued more than six years thereafter was regular without reviving the judgment.
3. That where the sheriff returned to the first writ of habeas, that "none came to receive possession," the presumption of release of the judgment did not arise in the same manner as if nothing had been done upon the judgment.
4. That the second writ might be executed by the removal from possession of a person who was the widow of a person that claimed under a judgment defendant.
5. That a recovery on the judgment roll for the whole of a lot, when in fact plaintiff proved title to the east half only, is not such an irregularity as to cause defendant to move against the judgment.
6. That the Court or a Judge would in such a case restrain plaintiff from taking possession of more than he in fact recovered.
7. That plaintiff in this cause having endorsed his writ for the recovery of the east half only, to which he proved title, there was no ground for the interference of either Court or Judge.

[CHAMBERS, September 12th, 1863.]

C. S. Patterson obtained a summons on behalf of Patrick Turley and Abraham Maybee, calling on John Johnston, his attorney or agent, to shew cause why the alias writ of hab. fac. poss. in this cause, and all process had thereon, should not be set aside; and why Patrick Turley, who is now seized of the estate of the Hon. George S. Boulton, whose tenant the above defendant was, and of the legal estate of the lands in question, should not be restored to the possession of the lands; or why the possession should not be restored to the widow of James Williamson, deceased, as the tenant of Turley, or to Abraham Maybee—

1. Because the writ is irregularly issued, the judgment not being revived, although one of the plaintiffs is dead, and although the defendant is dead.

2. Because upwards of six years from the entry of the judgment elapsed before the issue of the writ, and the said

John Johnston was not entitled to issue the writ without reviving the judgment.

3. Because the writ was executed against a tenant of Turley against whom there was no judgment.

4. Because the writs command the Sheriff to give possession of Lot No. 6, in the 7th concession of Murray, to plaintiff; whereas judgment was recovered against the plaintiff, claiming the same lot, in an action of ejectment, brought by plaintiff in this Court, against Abraham Maybee, and which last judgment was subsequent to the judgment in this cause.

By the affidavits filed on behalf of the application, it appeared that the patent of the lot issued to one James Johnson; that the heir-at-law (as it was said by Mr. Ruttan, but the heirship was denied by plaintiff) of the patentee sold this lot to Mr. Ruttan, in the year 1822; that Mr. Ruttan sold the east half of the land to the son of the defendant, in 1834; that Mr. Ruttan and those claiming under him, have been in possession since about the year 1830 or 1831; that in 1852, the plaintiff commenced an action of ejectment against the defendant for the east half, and another action of ejectment against Abraham Maybee to whom Ruttan had conveyed in 1846, for the west half; that the plaintiff obtained a verdict against McKenna, but failed against Maybee; that the same evidence which procured a verdict for Maybee could have been given in this suit against McKenna, if there had not been some understanding about it (the defence was the Statute of Limitations); that judgment was entered against McKenna on the 16th June, 1863, and a writ of possession issued upon which the Sheriff's return is endorsed—"that no one came to him to show him the tenements, or to receive the possession;" that long before the alias writ issued, William Johnston and the defendant died, that the alias was delivered to the Sheriff on the 21st May, 1863, and re-executed on the 1st June, by the east half being delivered to the agent of the surviving plaintiff, the said half being then in the possession of Williamson, who claims title under

Sylvester McKenna; that the surviving plaintiff threatens to put the writ in force against Maybee; that George S. Boulton owned the east half when this action was brought, although the defendant was in possession; that Boulton, in 1837, conveyed this half to McKenna, who mortgaged the same, and afterwards gave a deed of it to James Williamson, in 1858, who mortgaged it to John Hughes; and that Hughes assigned the mortgage to Durand, who assigned to Turley.

The title seemed really to be, on the part of the defendant, as follows: Daniel Johnston, assuming to be the heir-at-law of the patentee, conveyed to Ruttan; Ruttan to Patrick McKenna, whose heir-at-law the defendant was; the defendant to Robertson; Robertson to D. E. Boulton; D. E. Boulton to George S. Boulton; George S. Boulton to Wm. McKenna; Wm. McKenna to James Williamson; James Williamson mortgaged to Hughes; Hughes assigned to Durand; and Durand assigned to Turley, who, on the application, claimed as mortgagee.

It was alleged that the reason the plaintiff delayed executing his writ of possession was, that an action would be brought against him, and he would be turned out of possession on the same evidence which defeated him in the suit against Maybee, and that the case was purposely postponed till the witnesses might not be forthcoming.

For the plaintiffs, Meyers stated that the suit against Maybee was not taken to trial by the plaintiff, but by the defendant; that Sylvester McKenna and his wife were the principal witnesses upon whose testimony, as to the length of possession, the verdict was rendered; and that this evidence was opposed to all that McKenna had always told Meyers. He also gave a full narrative of the proceedings. William Johnston swore he was the heir-at-law of the patentee; that after losing the suit against Maybee, he made up his mind not to proceed for the west half any further; that McKenna applied for a new trial, but was refused it; that, he never was aware of any one being on the land till 1837, and that the evidence to the contrary was untrue.

It appeared that Turley had lately commenced proceedings in Chancery, and had perpetrated the testimony given on the trial in Maybee's suit, and was about to get a writ of possession from Chancery, when, as he said, the plaintiff had fore-stalled him.

Richards, Q.C., shewed cause. He argued: 1. The death of one of the two plaintiffs is no irregularity, although no suggestion is made on the roll of his death, and although his name is still used as if he were living, Arch. Pr. 11 edn. 596; *Rolt v. The Mayor of Gravesend* (7 C. B. 777; Con. Stat. U. C. cap. 27, sec. 27).

2. That the death of a sole defendant does not, in ejectment, abate the proceedings; because the writ of possession is against the land, or to deliver possession of the land, rather than against the defendant personally, *Withers v. Harris* (L. Ray. 808; Con. Stat. U. C. cap. 27, sec. 39).

3. That it was not necessary to obtain the leave of the Court, or of a Judge, to issue the alias writ, although more than six years had elapsed since judgment was entered, because an original writ of execution had been issued within the year, and returned and filed, *Hall v. Boulton* (3 Prac. Rep. 142).

4. That the plaintiffs, being entitled to possession, had the power to turn out any one in possession of the land, although a stranger to the original defendant; but in this case Mrs. Williamson, who was removed, was in possession under persons deriving title from the defendant.

5. That although in the separate suits which the plaintiffs brought against the defendant and Maybee, the whole lot was claimed from each defendant, and although the plaintiffs recovered against the defendant for the whole lot, there is no repugnancy in the judgment in Maybee's action being against the plaintiff for the whole lot; that Maybee never was, in fact, in possession of the east half, and there can be no estoppel in his favor against this plaintiff in McKenna's suit, to which he is a stranger.

C. S. Patterson, in reply, argued: 1. The right of a surviving plaintiff to go on in his own name and in the name of

a deceased co-plaintiff, only exists where the judgment is joint and the interests of the deceased passes to the survivor, which is not necessarily the case here; for the two plaintiffs may have been tenants in common, in which case the right of the deceased would not accrue to the survivor, but would devolve upon his heir or devisee; and that sec. 34 of the Consol. Stat. U. C. cap. 27, does not apply to this case at all, because this co-plaintiff died before this section of the act was passed, *Davy v. Cameron* (14 U. C. R. 483); *Ib.* (15 U. C. R. 175); *Rex. v. Cohen* (1 Stark. N. P. 511); and *Tidd's Pr.*, 8th ed., 1170; *Ib.*, 9th ed., 1119, 1121. 2. As to a sole defendant's death after judgment in ejectment, it does not seem to be decided that it is absolutely necessary to revive the judgment, although it is even here recommended to be proper to do it. 3. That this alias has been irregular, issued after the six years; because the plaintiff, never having applied to get the possession under his original writ, as appears by the sheriff's return, must be considered to have abandoned it; he cannot now, to avoid the necessity of the revivor, call in aid this effete process, *Doe d. Reymal v. Tucket* (3 Bad. 773).

ADAM WILSON, J.—'As to the death of one of the plaintiffs after judgment, and before the issuing of the alias writ, it is laid down in *Tidd's Pr.*, 9th ed., 1120, that "It is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors without a scire facias; but the execution should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment." And this statement of the law is expressly supported by *Bolt v. The Mayor of Gravesend* (7 C. B. 777); and in *Cooper v. Norton* (16 L. J. Q. B. 364). The case referred to in *Tidd* is *Penoyer v. Brace* (1 Ld. Ray. 244), which was trespass against five persons, and judgment against all. The five bring error; and pending the proceedings in error, one of the five plaintiffs in error dies;

upon which the plaintiff in the original suit sued out execution against all five; and it was held that if the writ in error had been certified to the Court, that it had abated by the death of one of the five, inasmuch as it was, until so certified, a supersedeas of the judgment below, the plaintiff below might have sued out execution against the four living and the fifth who was deceased, without first suing out a sci. fa. The argument is stated as follows: "Where a new person shall take benefit by or become chargeable to the execution of a judgment, who was not party to the judgment, there a sci. fa. ought to be issued against him to make him a party to the judgment, or in the case of executors and administrators; but where the execution of a judgment is not chargeable or beneficial to a person who was not a party to the judgment, there it is otherwise as where there is a survivorship." In the same case, in *Salk.* 319, it is added, "There is no reason why death should make the condition of survivors better than before." And *Holt, C.J.*, says that a "capias or fi. fa. being in the personalty, might survive, and might be sued against the survivors without a sci. fa.; otherwise if an elegit, for there the heir is to be a contributory." In the same case, in 8 *Mod.* 338, it is said, "If two plaintiffs recover, and one die before execution, the survivor may take it out without a sci. fa., because he is party and privy to the judgment; and if it should happen that the dead man had released the judgment, the defendant may bring audita querela, and be relieved."

In *Withers v. Harris* (7 *Mod.*, S. C., *Ld. Ray.* 806), judgment in ejectment, upon the terms that there should not be execution till a year and a half after, and whether this judgment could be executed without a sci. fa., was the whole question. *Holt, C. J.*, said "You may sue out execution in ejectment within a year after judgment, in the name of the defendant who has died within the year, without a sci. fa.; because in the writ hab. fac. pos. you do not say against whom the execution is to be had, but it is only to have the possession."

In *Adams on Ejectment* it is said, "Where a sole de-

fendant in ejectment dies after judgment and before execution, it has been doubted whether a sci. fa. is necessary, because the execution is of the land only, and no new person is charged; but the surer method is to sue out a sci. fa."

In *Newnham, Jun., v. Law* (5 T. R. 577), one of two plaintiffs died before judgment, but the suit went on to judgment and execution in the name of both of them. The defendant applied to set aside proceedings. The plaintiff surviving sued out a new rule to strike out the name of the deceased from the execution, and to suggest the deceased's death on the roll. Lord Kenyon, C. J.: "This objection should not have been taken by the defendant at all. The plaintiff might have made the suggestion as a matter of course, and he ought not to be permitted to make the amendment. Rule absolute to amend without costs, the defendant's rule being discharged."

In personal actions, then, there is no defect in one plaintiff, as survivor of his deceased co-plaintiff, who has died since judgment, proceeding to enforce that judgment by execution in the names of himself and of the deceased plaintiff; because there is a survivorship in law of the rights of the deceased to the one who is living; and there is no one, in the language of the cases, "to take benefit by or become chargeable to the execution of the judgment."

It is argued, however, by Mr. Patterson, that that is not the fact here, for it does not necessarily follow that the two original plaintiffs had such an interest as would accrue on the death of one to the survivor; that they might have sued under the statute as tenants in common, or in some other capacity, or interest, which was individual, and not joint; and that by the act of 1851, under which this action was begun, "the names of all persons claiming the property are to appear as plaintiffs, which may apply to separate interests;" and that the question at the trial should be (except in certain cases), whether the statement in the writ of the title of the claimants is true or false; and if true, then which of the claimants is entitled: and upon such finding, judgment may be signed and execution issue for the recovery of posses-

sion and costs, as at present in the action of ejectment, and the said judgment having the same and no other effect than at present.

All this shows rather that although plaintiffs may join personally now (which in effect they did under the former law as fictitious lessors of the fictitious plaintiff), the recovery shall be to the same effect and in the same manner under the present law, according to the respective rights and interests of the claimants, as it would have been under the former law by the same persons stating joint or several demises, according to the nature of their estates; so that if joint tenants join now as plaintiffs, they shall recover the entirety; and if tenants in common join, they shall recover in severalty, as they could by proper demises under the old law.

This I take to be the meaning of the statute; for the jury are to say which of the claimants is entitled, and then judgment and execution are to follow, as under the old law. The case of *Davy & Russell v. Cameron* supports this view.

Under the old law, tenants in common could not unite in a joint demise. Their proper way was to state their interests in severalty, although each one might state a demise for the entirety (2 Chit. on Plg., 6th ed., 630). Joint tenants could lay a joint demise, but they could also lay individual demises for the entirety. If tenants in common proceeded each in the one action for their undivided shares, the recovery of judgment would show on the face what portion went to each lessor; so that on the death of one, the survivor could not have execution for the share which belonged to the deceased. And if they proceeded in the one action by separate demises for the entirety in each demise, they could only recover according to the fact and nature of their title, and not for the entirety which each claimed; so that here again the recovery would, notwithstanding the larger demand, show what each lessor was entitled to; so that one, on the death of the other, could not claim the deceased's share. So if joint tenants proceeded on a joint demise, as they might, the

recovery would follow the nature of the demise, and show a joint title, which would therefore, on the death of one, devolve entirely upon the survivor, and entitle him, according to the above decisions, to execution for the whole; because it would appear on the face of the record that no one else than himself was to take benefit by or become chargeable to the execution of the judgment. But if joint tenants, instead of joining in the demise, proceeded each on a separate demise for the whole, as they might, this would not entitle each one to a recovery for the entirety, but only to his own particular share, and would amount to a severance of the tenancy, which, appearing upon the record, would prevent the survivor from claiming the entirety or more than his own share upon the decease of his co-tenant.—*Doe dem Raper v. Lonsdale* (12 East. 39); *Doe dem. Marsack v. Read* (12 East. 57); *Doe dem. Brown v. Judge* (11 East. 288); *Doe dem Whayman v. Chaplin* (3 Taunt. 120); *Doe dem Hillyer v. King* (6 Exch. 791); *Doe dem. Poole v. Ervington* (1 A. & E. 750); which last case contains some of the above, and many other authorities bearing on the subject.

The conclusion to be drawn from my view of the law is, that the joint claim by two under the act of 1851, and a joint recovery, is evidence of a joint estate and title in the two plaintiffs so recovering; and that a separate right, title or interest, if it existed, should, however the writ was framed, have been found by the jury, and so entered on the record, to show incontrovertibly, for the purposes of execution, that the rights of the plaintiffs were several. In fact, in the absence of such several recovery, I must take the recovery, for the purposes of execution, to have been and to be a joint recovery, and therefore a title which does survive, and to which no other person can take benefit, or become chargeable.

This disposes of the first objection, and, from the cases before mentioned, it disposes also of the second.

The third question, I think, is determined by the fact that an execution did in this case in fact issue, and was also returned and filed within the year. The sheriff's return, that none came to receive possession, does not, I think, raise

the presumption, which want of an execution altogether raised in law, that the plaintiffs had released the judgment. Nothing done upon a judgment might well raise this presumption, but something done upon it could not raise such presumption contrary to the act done.

As to the fourth objection, I think, without determining the abstract right of how far the sheriff may proceed in executing a writ of possession, that he was justified in removing Mrs. Williamson, the actual occupant of the premises; because she was in possession by right of her husband, who did claim title under Sylvester McKenna, the defendant in this action, or those in privity with him. In such a case an action for mesne profits would, under the old law, have been maintainable against her.—*Doe v. Whitcombe* (8 Bing. 46); *Doe v. Harvey* (8 Bing. 239); *Doe v. Harlow* (12 A. & El. 40).

And lastly, that although the plaintiff's recovery is for the whole lot against the defendant, when in fact he proved title only to the east half, and should have recovered for that only, the recovery itself is not regular, although the court will restrain the plaintiff on motion from taking possession of more than he actually proved title to, if he offers to exceed that limit; but in this case the plaintiff has not offered to do this, but has limited his endorsation to the sheriff to deliver the east half only; and this is all which the sheriff has delivered.

Upon the whole, therefore, the summons must be discharged, with costs.

Summons discharged with costs.

IN THE MATTER OF GEOFFREY HAWKINS.

Habeas corpus—Power of Judge to issue—Con. Stat. U. C., cap. 24, sec. 41—Judgment for costs—Form of order of committal when made by Junior Judge of County Court.

Held, 1. That at common law the Judges of the Superior Courts of Common Law for Upper Canada have power to direct the issue of writs of habeas corpus ad subjiciendum in vacation, returnable either in term or vacation.

2. That a plaintiff against whom a defendant has recovered a judgment for costs only, in either of the Superior Courts of common law or a County Court, is not liable to be examined or committed under sec. 41 of Con. Stat. U. C. cap. 24.

Quære, must an order of committal made by a Junior Judge of a County Court, under sec. 41, of Con. Stat. U. C. cap. 24, on the face of it show the death, illness, unavoidable absence or absence on leave of the Senior Judge.

Semble, it need not; for the maxim omnia presumuntur recte esse acta will be held to apply.

[CHAMBERS, September 14th, 1863.]

The sheriff of the United Counties of York and Peel brought up the body of Geoffrey Hawkins, under a writ of habeas corpus, dated the second day of September instant (in term time), and issued on a fiat of Mr. Justice Morrison, by which the sheriff was commanded to bring the party before the presiding Judge in Chambers, or one of the Judges of the Court of Queen's Bench, forthwith, to do, receive and suffer all and singular those things which the said Judge should then and there consider of him in this behalf.

The writ was tested in term time, in the name of the Chief Justice of Upper Canada, and marked—

“By Statute 31 Car., ad faciendum, subjiciendum, recipiendum,

CHAS. C. SMALL.”

and was not signed by any judge.

To this writ the sheriff returned that by virtue of it he had the body of the party, whom he arrested on the third of September, under an order, of which a copy was annexed to the writ; which order was made by the Junior Judge of the County Court of the United Counties of York and Peel, for not attending and being examined according to an order and appointment.

The copy of order attached was in a cause in the County Court of the United Counties of York and Peel, in which

Geoffrey Hawkins was plaintiff, and John Kenrick was defendant, and was as follows :

“ Upon reading the summons issued in this cause, on the seventeenth day of July instant, calling on the above-named Geoffrey Hawkins (judgment debtor) to shew cause why he should not be committed, pursuant to the statute, for not attending to be orally examined, under the order made in this cause on the eleventh day of June last, before William Mortimer Clark, Esquire, the examiner named in said order; and the appointment of the said William Mortimer Clark made therein duly served on said Geoffrey Hawkins; and upon reading the affidavit of service of said summons; and the enlargement thereof, made respectively on the twentieth and twenty-ninth days of July last, on the undertaking of said Geoffrey Hawkins by his counsel, that he would attend before said examiner, William Mortimer Clark, Esquire, at his office, on Monday, the twenty-seventh day of July last, and Wednesday, the fifth day of August instant, respectively, at three o'clock in the afternoon of the said last mentioned days, and submit to be examined pursuant to said order; and upon reading the several reports of the said examiner, that the said Geoffrey Hawkins again failed to attend on both said last mentioned days; and the several affidavits of John Alexander Kains, to the same effect; and the said summons, by virtue of the said enlargements, being now returnable, and no cause being shewn to the contrary:

I do order, that the said Geoffrey Hawkins be committed to the common gaol of the United Counties of York and Peel (being the counties in which the said Hawkins resides) for the period of thirty days, pursuant to the statute in such case made and provided, for his default in not attending and being examined, pursuant to said order and appointment. And I do order that the sheriff of the said United Counties of York and Peel do arrest and commit the said Geoffrey Hawkins accordingly.

“ Dated at Chambers, August 7th, 1863.

(Signed)

“ JOHN BOYD, J. J.

“ To the Sheriff of the United Counties of York and Peel.”

The habeas corpus was granted on the affidavit of Mr. Hawkins, to the following effect, so far as it was material to the present decision, that he was the plaintiff in a certain action against John Kenrick in the County Court, that Kenrick recovered a judgment against Hawkins in the action for costs of defence and nothing else; that he urged in the County Court against his examination that the judgment was for costs only, that an order was made on which he was arrested, that he was the judgment debtor in that action; and that he was arrested on the order referred to.

It did not appear expressly by the return that the judgment was for costs only.

The affidavit on which the writ was granted stated this fact, and perhaps sufficient might have been made out of the order itself to lead to the same conclusion.

Mr. Hawkins, upon the return being read and filed, moved for his discharge upon several grounds, some, if not all of which, but one—viz., that he was entitled to be discharged upon the ground that he was not liable to be examined or, arrested on a judgment for costs only—were overruled at the time.

Robert A. Harrison shewed cause. His argument and the cases relied upon by him appear in the judgment of—

ADAM WILSON, J.—The question arises on the 41st sec. of cap. 24 of the Consolidated Statutes for Upper Canada. The 287th sec. of the C. L. P. Act of this country, which corresponds with the 60th sec. of the C. L. P. Act (1854) of England, must also be referred to, as well as sec. 160 and some of the following sections of our Division Court Act.

The point raised is of some importance, although not of much difficulty, further than the presumed opinion of the ex-Chief Justice of Upper Canada, then Mr. Justice McLean, hereinafter referred to, intimating his holding a contrary opinion, must necessarily make it so, and I shall be obliged, in vindicating my opinion, to set out the sections referred to at large.

The consolidated Act for U. C. cap. 24, sec. 41, provides that, "In case any party has obtained a judgment in any Court in Upper Canada, such party or any person entitled to enforce such judgment may apply to such Court, or to any Judge having authority to dispose of matters arising in such Court, for a rule or order that the judgment debtor shall be orally examined upon oath before the clerk of the crown, or before the Judge or clerk of the County Court within the jurisdiction of which such debtor may reside, or before any other person, to be named in such rule or order, touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment has been obtained was incurred; and as to the property and means he still hath of discharging the said judgment and as to the disposal he may have made of any property since contracting such debt or incurring such liability; and in case such debtor does not attend, as required by the said rule or order, and does not allege a sufficient excuse for not attending; or, if attending he refuses to disclose his property or his transactions respecting the same; or does not make satisfactory answers respecting the same; or, if it appears from such examination, that such debtor has contracted or made away with his property, in order to defeat or defraud his creditors, or any of them—such Court or Judge may order such debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months; or such Court or Judge may, by rule or order, direct that a writ of ca. sa. may be issued against such debtor, and a writ of ca. sa. may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such Court or Judge may make a rule or order for such debtor's being committed to close custody under the 35th section of this act."

The English C. L. P. Act of 1854, sec. 60—which is, in fact, the same as sec. 287 of our C. L. P. Act—enacts that, "It shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts to apply to the

Court or a Judge for a rule or order that the judgment debtor shall be orally examined as to any and what debts are owing to him before a Master of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge shall make such order for the examination of such debtor, and for the production of any books or documents; and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a Master under this act."

But this section of the C. L. P. Act, although corresponding with the above section 41 in many particulars, is not the one from which that section has been taken, for this last section is not confined to creditors only, and it goes far beyond the C. L. P. section in many other respects.

The provisions with which it more nearly agrees are to be found in sections 160 and 165 of our Division Courts Act, which are taken from the County Courts Act of England, 9 and 10 Vic. cap. 95, secs. 98 and 99.

Section 160 of the Division Courts Act enacts to the following effect, that "Any party having an unsatisfied judgment or order in any Division Court for the payment of any debt, damages or costs, may procure a summons requiring the defendant to appear at a time and place therein named to answer such things as are therein named; and if the defendant appears he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liability which formed the subject of the action, and as to the means and expectations he then had, and as to the means and property he still has of discharging the said debt, damage or liability, and as to the disposal he has made of any property."

Sec. 165 enacts in substance that if the party so summoned,

1. Does not attend, &c., &c.

4. If it appear to the Judge that the party obtained credit from the plaintiff, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust, or that he wilfully contracted the debt or liability, without

having had at the time a reasonable expectation of being able to pay or discharge the same.

5. If it appears to the satisfaction of the Judge that the party had, when summoned, or since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the Court in which the judgment was obtained has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the Judge may, if he thinks fit, order such parties to be committed to the common jail of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

Section 170 authorises the Judge to rescind or alter any order for payment previously made against any defendant so summoned.

Section 171 authorises the Judge to examine both plaintiff and defendant, and also any other persons touching the several things hereinbefore mentioned, under certain circumstances, before judgment, and commit the defendant to prison, in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment.

Section 172 enacts that no protection, order or certificate granted by any Court of Bankruptcy for the relief of insolvent debtors, shall be available to discharge any defendant from any order of commitment.

Section 173 declares that no imprisonment under the act shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or to deprive the plaintiff of any right to take out execution against the defendant.

Mr. Hawkins contended that under sec. 41 before stated, he was not liable to be arrested, because he was the plaintiff in the action, and judgment had been recovered against him for costs only, and he also maintained that the proceedings

were open to several other exceptions, which I overruled. He cited the case of *Challin v. Baker* (26 L. T. 206), in support of his view that an arrest could not be made for costs only, and which he contended was applicable to his case, although that was a decision under the English C. L. P. Act, sec. 45, before set out, referring to where a creditor obtains a judgment; and although our act, under which the arrest was made, is more comprehensive than that section; for he argued that the true construction of our act does not at any rate enable a defendant to examine a plaintiff or arrest him, when a judgment is for costs only.

Mr. Harrison, contra, argued that the Legislature, in sec. 41, by using the expression "any party," did so advisedly, to afford a defendant the very reasonable remedy which he ought to have, as well against the plaintiff, as the plaintiff against the defendant, for the discovery of the plaintiff's estate and effects, in order that they may be applied to the liquidation of the costs of the action, which, it must be presumed, have been unjustly imposed upon the defendant by the plaintiff's wrongful proceedings, and which may amount to a large sum, and are at all times of serious consequence to defendants; that the arrest is not for the nonpayment of costs—which would be contrary to section 3 of the act—but for the neglect and wilful contempt of the plaintiff to the order of the Judge—and that there is a plain distinction between the two cases, of which the decision in *Henderson v. Dickson* (19 U. C. R. 593), is a very excellent illustration: and that the process has not been pressed vindictively against the applicant, for if he will now engage to appear and be examined according to the order of the Judge his longer imprisonment will not be insisted on.

Mr. Harrison referred to the decision given below of the ex-Chief Justice of Upper Canada, Mr. Justice McLean, in *Meyers v. Robertson* (5 U. C. L. J. 251), determining that the section is not restricted to creditors, and is applicable to those cases in which judgments have been recovered against plaintiffs for costs only.

Mr. Harrison further contended that this writ of habeas

corpus was not one which could be issued under the 31 Car. II. cap. 2, for that act applied to criminal cases only, which this is not; and that the Imperial Statute 56 Geo. III. cap. 126, which enables Judges of the Superior Courts to issue and adjudicate upon such writs in vacation, in other cases than those which are embraced in the Statute of Charles, does not extend to, and has never been adopted in this province; that the applicant should, therefore, have applied to the Court in term time, as he was arrested when the Courts were sitting, or must apply in the ensuing term, if he be then in custody; and he referred to Crowley's case (2 Swanst. 1), as a decision upon this point.

As I entertained very strong doubts upon the power of the Judge to commit under the circumstances stated, I bailed the applicant, binding him to appear from time to time before the Judge in chambers until the matter was finally disposed of.

The case of *Challin v. Baker* (26 L. T. 106), which was cited by Mr. Hawkins, is as follows:

The defendant in that case was called upon by Judge's summons to shew cause why she should not, under the 60th sec. of the C. L. P. Act of 1854, attend before the Master and submit to examination as to the debts due and owing to her or accruing due; and why, also, she should not produce all books of account, &c., relating to such debts. The judgment had been obtained in ejectment. Mesne profits were not claimed. A verdict was taken against the defendant, she not appearing, and costs were taxed at £35 13s. 2d.

For the plaintiff it was contended that he having obtained a judgment, was entitled to an order to examine his "judgment debtor."

For the defendant it was contended that the plaintiff was not a creditor who had obtained a judgment within the meaning of the section; that although he may become a judgment creditor in respect of his costs, yet the statute only applies to actions in which the plaintiff is a creditor at the time of the action brought; that in fact it refers only to creditors bringing actions for the recovery of debts or pecuniary

demands in respect of which they have given credit. Platt, B., said that the statute clearly did not apply to a plaintiff in ejectment, and therefore dismissed the summons with costs.

The case of *Meyers v. Robertson* (5 U. C. L. J. 254), referred to by Mr. Harrison is as follows:

The defendant called upon the plaintiff to shew cause why a writ of ca. sa. should not issue against the plaintiff for his contempt in not appearing and submitting to oral examination, in pursuance of an order and appointment, duly made under the 22 Vic. cap. 96, sec. 13, now forming sec. 41 of the Consolidated Act for Upper Canada before referred to.

No cause was shewn by the plaintiff. The defendant applied for the usual order for a ca. sa. under the statute. McLean, J., on hearing that the judgment was in favour of the defendant for the costs of defence merely, refused the order, on the ground that no ca. sa. could not issue for costs only; but he said "he would grant the order for committal of the plaintiff under the statute, and he allowed the summons to be amended and again served for the purpose."

I have considered both of the cases on this particular point to which I have been referred, and while I quite agree with the decision of Baron Platt, that under the clause relating to any creditor having obtained a judgment, no power is given to a plaintiff in ejectment to proceed by the examination of the defendant, when the recovery is for costs merely, and which equally excludes a defendant from so proceeding for his costs only, because in neither case is the party applying "a creditor who has obtained judgment." I am not called upon to dissent from any opinion of Mr. Justice McLean, because he made no decision that the defendants could examine, and arrest for not submitting to examination, the plaintiff in a case when the judgment had been recovered the costs only, because Mr. Justice McLean pronounced no decision whatever. He simply granted a summons on the plaintiff to shew cause why he should not be committed for contempt—a course which might, and no doubt would have been taken by any other Judge, to hear on argument what

could be advanced in favor of or against such an application. It does not appear that any order was even made, and it is quite clear that no opinion was expressed upon the occasion.

There is then no authority contrary to the opinion which I entertained upon the construction to be placed upon the 41st section of this act. And if this section be read in connection with sec. 287, there is a decision expressly in favor of my opinion. Or if it be read with the light of the sections of the Division Courts Act before referred to, it will be manifest that this summary proceeding to enforce the payment of a judgment for costs only cannot be maintained, because every word of these sections applies to plaintiffs as against defendants only, and applies to those cases in the same manner as the 41st section under consideration, where the party proceeded against "contracted a debt or incurred a liability which formed the subject of the action."

I think that this section does, however, apply to other cases than to those where the relation of creditor and debtor strictly exists, for by this section any party who has obtained a judgment may apply to have the judgment debtor examined. Now any party is certainly not a word applicable only to creditors. Nor is the expression judgment debtor necessarily restricted to those cases where judgment is recovered for a debt—as every person who has a judgment rendered against him for a sum of money and costs is properly then, whatever he was before, a judgment debtor. Nor is the word "liability" synonymous with "debt." It may apply to any other cause of action, as for instance, trespass—trover—detinue, &c., where something else is recovered than the costs. And if the act stopped here, I should not feel at liberty under this section, unless it is to be controlled by sec. 287, before mentioned, to say that a defendant who had obtained a judgment for costs only, was not a party who might examine the plaintiff as a judgment debtor respecting his estate and effects. But the apparent comprehensiveness of the early part of the clause is very plainly and precisely controlled when it expresses what the subject of examination is to be—respecting his property and means at the

time "when the debt or liability, which was the subject of the action in which judgment has been obtained against him, was incurred, . . . and as to the disposal he may have made of any property since contracting such debt or incurring such liability."

The act, although carried beyond the strict case of the party applying having been a creditor, is nevertheless expressly confined to those cases only where the judgment debtor had "contracted a debt or had incurred a liability which was the subject of the action" in which judgment had been obtained against him, which may perhaps include almost every case in which there is a recovery by a plaintiff against a defendant for some pecuniary amount beside the costs of the action. But it may not include the case of a defendant who has a judgment for his larger set off, because it can scarcely be said that that set off was the subject of the action, which I understand to mean is the same as the cause of action. It certainly, however, does not, in my opinion, extend to any case in which costs alone are recovered by a defendant, for in no sense can they, as between party and party, be said to be the subject of the action.

I think the whole scope of the clause bears this construction, and it emphatically corresponds with the declaration in the third section of the act that "no person shall be liable to arrest for non-payment of costs," and also with sec. 287 of the C. L. P. Act.

It is true that this arrest is not in form for non-payment of costs, but it certainly is in respect of the non-payment of costs—and the summons and order for Mr. Hawkins' examination, and probably also the summons and order for his committal would, before arrest, have been held by all parties as discharged by a payment of those costs. As no doubt that would have been the effect of a payment, it makes me all the more careful while giving full effect to the distinction between the form and the substance of such a proceeding. We see that the form is strictly within the plain provisions of the law authorizing an arrest, where such provisions do not authorize an arrest for the substance.

It is noticeable that under the Division Courts Act a plaintiff may examine a defendant where he has a judgment or order for costs.

With the express legislative declaration contained in the analogous clauses already mentioned in the Division Courts Act, and with the equally strong inference to be deduced from the language of the 41st section itself, I have no difficulty in saying that in my opinion the defendant in the County Court judgment had not the right to call upon the plaintiff to submit to an examination, nor had the Judge of the Court below the power to order his imprisonment for not appearing for examination.

I do not however, by any means, say that the Judge acted harshly. On the contrary, I think, while he assumed he had the power which he exercised, that he acted with a good deal of forbearance, considering the number of enlargements of the summons which were made to afford the applicant an opportunity of submitting to an examination and to spare himself from the unpleasant duty of committing the plaintiff to gaol, for what must have seemed to him a direct contempt of his order.

It is urged by Mr. Harrison that the applicant cannot be discharged by any of the Judges of the Common Law Courts in vacation, although he may be discharged by the Court of Chancery, or by any Judge of that Court exercising the functions of the full Court, because that Court is always open, while the Common Law Courts are open only during the terms.

There is no doubt that the statutes before referred to by Mr. Harrison, and the important decision of Lord Eldon, also referred to by him, give much countenance to this doctrine. And that at different times very great doubt existed whether the Common Law Judges really did possess the power of acting upon the writ of habeas corpus in vacation, in cases not within the operation of the statute of Charles the Second; but without entering into any argument to meet this assertion of the state of the law, it is quite sufficient for me to say that I find it decided in Leonard Watson's case (9 Ad. & El. 731), that a single Judge does possess such a power

at the common law in vacation; and with this decision, which has been acted on ever since, I shall not hesitate to exercise the power until I am corrected by some higher tribunal. It is a power which has been exercised in this province for many years past without doubt or controversy, and I shall not cast doubt upon such a power now. I find that Sir James Macaulay, who, besides his great judicial qualifications, was remarkable for his caution, and most unlikely to assume a power which he did not clearly think he possessed, said in *Reg. v. Tubbee* (1 Prac. Rep. 100), "He would have granted the habeas corpus in chambers had it not been found desirable to amend the papers on which the application was founded, and not being able conveniently to remain in chambers until they were corrected, he requested the prisoner's attorney to apply to Mr. Justice Burns, who granted the writ," and I know of many other cases of a similar kind before many of the other Judges, and I believe it is the well known practice of the Crown office from the enquiries which I have caused to be made there.

My opinion then is, that the Superior Courts of Common Law of this province, and the respective Judges of these Courts, have the like powers of issuing the writ of habeas corpus which the Superior Courts, and the Judges of such Courts, possess in England, and that the authorities shew that such writs may be issued and may be made returnable before a single Judge in vacation at the Common Law.

The prisoner then being properly before me, I have enquired into the cause of his imprisonment, as I was bound to do, and I find him, in my opinion, illegally in custody, and therefore I discharge him.

This (Mr. Justice Wilson added to the foregoing) was the opinion I was prepared to express, but it was intimated to me if I had no objection, that as the matter was of some importance, it might be desirable to have it reargued before myself and an associate Judge. Accordingly I requested his Lordship the Chief Justice of Upper Canada to be good enough to attend for the purpose, which, at great incon-

venience to himself, whilst preparing his numerous judgments in cases argued during last term, he at once consented to do, as it was a case involving the personal liberty of the subject. The re-hearing has since taken place before the Chief Justice and myself. Mr. Hawkins, assisted by Mr. Doyle, supported the application, and Mr. Paterson opposed it, when the substance of the arguments above mentioned were again advanced, which, I must say, did not at all shake my opinion as above stated; and I have now the satisfaction of being fortified in the correctness of my view by the superior judgment and long judicial experience of the Chief Justice of Upper Canada, who is clearly of opinion that under sec. 41 of cap. 24, of the Consol. Stat. U. C., a plaintiff cannot be compulsorily examined or considered as in contempt for not submitting to such examination, or be imprisoned for such contempt upon a judgment recovered by a defendant for costs only.

The Chief Justice is also clearly of opinion that at Common Law a Judge has the power to issue a writ of habeas corpus, and to adjudicate upon it in vacation.

It has not become necessary to determine the other questions of the due service of the proceedings in the court below, or whether the applicant's residence was properly in the United Counties of York and Peel, so as to be subject to arrest within these counties; but a new point occurred in the course of the re-hearing which had not been noticed before, namely, that the order on which the arrest took place was issued by the junior Judge, and it nowhere appears under sec. 6 of the County Courts Act, that the senior Judge, who is still living, was ill, or unavoidably absent, or absent on leave at the time, which are the conditions necessary to exist to give the junior Judge jurisdiction over the County Court business; but as it is not necessary to give any opinion on this question for the decision of this case, it is only stated in order that it may not appear that the matter has escaped attention. Perhaps the maxim *omnia presumunter recte esse acta*, as the Chief Justice said, may apply, and the gen-

eral presumption that a person acting in a public capacity is duly authorised so to do.

The general result, as I have above mentioned is, that Mr. Hawkins must be discharged from his imprisonment.

I have only to add that the Chief Justice is in no way answerable either for my language or my reasoning—he has only desired me to express his opinion that the plaintiff was not liable to be examined or committed for or in respect of costs only, according to his construction of the statutes.

Order for discharge.

HAWKINS V. PATERSON ET AL.

Security for costs—When demandable in the case of a plaintiff within the jurisdiction of the Court—Rule to be followed in case of conflict of decisions between the English Courts of Common Law.

Held, that if the plaintiff be actually a resident of the province at the time of the application for security for costs, and intend to remain here until trial or judgment in the cause, security for costs ought not to be ordered.

Semle.—If a resident in the province were to declare his intention of leaving for abroad at once, and had sold off his property, and made other preparations for an immediate departure, with the intention of residing abroad, that upon these facts being shewn, the party might be called upon to give security, according to the general practice.

Held, also, that we are not to adopt as a rule the decisions of the Court of Queen's Bench in matters of practice, more than those of the Courts of Exchequer or Common Pleas, but exercise our own judgment as to which is the best practice to adopt, and adopt that which will be most convenient and suitable for ourselves, whether it be the decision of the one Court or the other.

Gill v. Hodgson, 1 Prac. R. 381, doubted.

[CHAMBERS, October 5th, 1863.]

The defendant obtained a summons calling on the plaintiff to shew cause why proceedings herein should not be stayed until sufficient security be given to answer the defendant's costs, in case the plaintiff discontinue, &c., on grounds disclosed in the affidavits and papers filed.

The summons was obtained on the following affidavits, viz.: the affidavit of Mr. Paterson, one of the defendants, who stated—That he was informed and verily believed that the plaintiff was staying merely temporarily in Upper

Canada, and would leave permanently before the defendants (if successful herein) could enter judgment for their costs; and since the commencement of the action he (deponent) had spoken to Mr. Doyle, plaintiff's attorney, on the subject of security for costs, and asked for the same, and he said he supposed the plaintiff would give such security, and that he did not see how the plaintiff could get out of it, and he said to the deponent that he (deponent) had, however, better demand it; that such demand had been made, but security had not been given, and that issue was not joined.

2. The affidavit of J. O. Heward, who stated—That in a conversation he had with plaintiff in September last, he stated to the deponent that he was about going to England, that he had proceeded as far as Quebec, when he learned of certain proceedings being taken against him, to commit him to gaol for not attending to be examined pursuant to order, that he had merely come back to Toronto to attend to the matter, and that he intended to bring an action in consequence of his arrest; and that plaintiff also gave deponent to understand, from the purport of his conversation, that he was merely staying temporarily in Toronto, in consequence of the matters aforesaid, and in order to institute and prosecute the said action, and would then go to England as soon as he saw the matter through.

Mr. Heward made a further affidavit on the plaintiff's application respecting the subjects contained in his previous affidavit, under the 188th section of the C. L. P. Act, to the following effect—That as near as he could recollect the words made use of by the plaintiff were as stated in the former affidavit, viz.: "I understood him to say he was going to prosecute this action, and see the matter through, and that he had intended to stay in the country for that purpose;" that plaintiff had no dwelling house that deponent was aware of; and that "from what he said I thought he intended to return to this country again; he was in Quebec when he heard of the order against him for his arrest, and he stated he was determined to come back and face the music, as he had friends in this country as well as in England.

The affidavit of Mr. Kenrick, one of the defendants, sets forth—That before the commencement of this action the plaintiff gave up his house and disposed of its effects, removed his wife and family from Yorkville to Quebec, with the intention of going to England, there permanently to reside, as the deponent was informed and believed; that the plaintiff himself went to Quebec for the same purpose, and shortly before this action returned to Toronto; that the plaintiff in an affidavit made lately stated—“That my residence is not, nor has it since the 18th of July last—been within the United Counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said united counties; that the plaintiff, as the deponent believed, was remaining here to prevent the defendants obtaining security for costs, and that his intention was to leave Canada permanently after he considers it too late to move for such security, or, at all events, before judgment could be entered against him for costs of defence, in case the defendants succeeded in the action; and that he believed the plaintiff was insolvent, and had no property in this country, or had so disposed of it that it cannot be reached by an execution.

The defendants also put in a copy of plaintiffs's affidavit, which he filed on applying for the habeas corpus which was lately issued on his behalf,* in which the following statements appeared:

“I, Geoffrey Hawkins, of Hitchin, England, gentleman, make oath and say, &c., “That for some years previously to the last mentioned day (the 11th of June, 1863), my residence has been in the County of York: that before judgment was signed in this action (Hawkins v. Kenrick), I had, in accordance with my pre-arranged purpose, given up my house and sold my furniture preparatory to my leaving this province, returning to England, my domicile, with my wife and children: that in May, and before judgment was signed against me, I sent my wife and children to Quebec, en route

* In re Kawkins, 9 U. C. L. J. 295.

for England, and went into lodgings here, intending to follow them as soon as I had arranged some matters of business: that on the 18th of July, I left this city (Toronto) for Quebec, there to rejoin my wife and children, intending to go thence direct to England; that hearing that an order had been made by the Judge of the County Court for my committal, I returned to Toronto: that my residence is not, nor has it since the 18th of July, been within the United Counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said counties."

M. C. Cameron, Q.C., shewed cause to the summons, and contended according to the cases of *Dowling v. Harman* (6 M. & W. 131); *Tambisco v. Pacifico* (7 Exch. 816), and *Drummond v. Tillinghist* (16 Q. B. 740), that security for costs could not be directed, because plaintiff was a resident in this province, and because he had no intention of leaving until the present action was entirely settled.

Robert A. Harrison, contra, insisted that it distinctly appeared the plaintiff's domicile is in a foreign country, and that he was only here temporarily, intending to leave in a very short time, and before judgment (if he should fail in the action) could be entered against him; that under these circumstances it was only reasonable plaintiff should be called upon to give security for costs; that according to the decision of the Court of Queen's Bench in England, he was under the circumstances bound to give such security. *Oliva v. Johnson* (5 B. & Al. 908); *Gurney v. Key* (3 Dowl. P. C. 559); *Drummond v. Tillinghist* (16 Q. B. 840). There is a difference between the English Court of Queen's Bench on the one side and the English Court of Common Pleas and Exchequer on the other, as to the practice in such a case; but that in this county it had been determined by the late Sir John B. Robinson, that we should follow the practice of the Court of Queen's Bench: *Gill v. Hodgson* (1 U. C. Prac. Rep. 381). He also referred to *O'Grady v. Munro* (1 Grand. 406); *Barrett v. Power* (25 L. Eq. Rep. 524); *Story's Conflict of Laws*, secs. 41-45. He adverted to the fact that

plaintiff had not filed an affidavit of any kind in answer to the summons and the affidavits on which it had been granted, and argued that his conduct was most conspicuous.

ADAM WILSON, J.—The practice with respect to the granting of security for costs has varied a good deal from time to time.

In *Sellon's Pr.* 470, it is laid down that such security will only be granted in two cases.

First. When an infant sues as plaintiff.

Second. When the plaintiff resides abroad.

The rule is not extended to third persons suing in the names of insolvent plaintiffs, and to convicts under sentence, and perhaps to other cases.

In *Parquot v. Eling* (1 H. Bl. 106), security was refused to be ordered, although the plaintiff resided abroad, because it did not appear he had gone abroad to avoid the payment of his debt. But in *Ganesford v. Levy* (2 H. Bl. 118), the practice was altered and security ordered on the ground of a foreign residence alone.

Several cases have been decided since these cases. The following are the principal ones, and are those which are generally referred to as applicable to this question:

Ciragno v. Hassan (6 Taunt. 20), decides that security for costs will not be exacted so long as the plaintiff remains in the country.

The Anonymous case (8 Taunt. 737), is to the same effect, even although the plaintiff usually resides abroad.

Oliva v. Johnson (5 B. & Al. 908), determined that where it was shewn the plaintiff carried on business abroad, at Quebec, and had no house or permanent residence in England, and was a Canadian by birth, and had permanently resided at Quebec (except during occasional visits to England, on matters of business), that he would be ordered to give security for costs. And the Court said to the plaintiff's affidavit should state, first, that the plaintiff has been and is now a resident in England; second, that he intends to continue to reside in the country.

In *Gurney v. Key* (3 Dowl. P. C. 559), it appeared that the plaintiff was in England when the action was commenced, but that he was abroad when the application for security for costs was made. The plaintiff stated that he was temporarily resident abroad for the education of his children; that he was in England, and had a residence there when the action was commenced, and that he had been in England since, when he made an affidavit describing himself there as of Trevilian House, Tregony, in the county of Cornwall; from which it was argued that it appeared that he was a resident in England, although frequently abroad, and that he therefore came within the rule laid down in the *Anonymous* case, in 8 Taunt. 737, and could not be ordered to give security for costs. It was also argued for the defendant that the plaintiff had not sworn that he resided in England. That in an affidavit which he had lately made for the purpose of getting his discharge from an arrest for debt, on the ground of privilege as a witness, he had stated himself to be a resident abroad. Mr. Justice Williams said, "Upon the affidavit, I have no doubt that the residence of the gentleman is now abroad. He does not state himself in his affidavit to be resident in this country, but merely describes himself as of Trevilian House, &c. In his former affidavit to be discharged from arrest, he stated himself to be resident abroad; and in the present case, if he had a domicile here, I presume he would have stated it. I must therefore take it as a fact that he had not a domicile here, but that he has only been in this country for certain temporary purposes, there being nothing to shew that his residence abroad is merely temporary. I therefore think that on that ground he ought to give security for costs."

This case has no particular bearing upon the main question now before me, because the plaintiff in it was residing abroad at the time of the application.

Dowling v. Harman (6 M. & W. 131), shews that although the plaintiff be a foreigner, and be in the habit of frequently going abroad, and was abroad at the commencement of the action, yet, if he be in England at the time of the

application for security for costs made, and intends to remain until after the trial, that security for costs will not be ordered.

Tambisco v. Pacifico (7 Exch. 816), maintains the decision in *Dowling v. Harman* (6 M. & W. 131), and the practice of the Court of Common Pleas, against the decision of the Queen's Bench in *Oliva v. Johnson*, although that case was pressed upon the attention of the Court. The Chief Baron says, "the plaintiff states that he came from Greece for the purpose of bringing the action, and that he is now here, and that he intends to remain here until judgment is obtained in it." Alderson, B., says, "it is suggested that plaintiff's affidavit should also have stated that he intends to take up his permanent residence here, but such a statement would have been of very little avail, for he might change his intention the moment judgment had been given. The fact of his being actually resident here is the true criterion by which the question is to be settled."

Drummond v. Tillinghist (16 Q. B. 740), determines that it is not sufficient ground for requiring security for costs, that the plaintiff is a foreigner lately come to England, having no family connections or permanent abode in it, and likely soon to leave it, if it be not sworn that he has a permanent residence abroad. Lord Campbell, Chief Justice, says, "No case goes beyond this, that a foreigner being in England, but having his domicile out of the country, may be called upon to give security. Here no such domicile is shewn. The presumption must be that the party will continue to reside where he is."

In the latter case the plaintiff was a cook on board an American vessel, and was a native of the United States. The vessel came to England. The plaintiff brought this suit against the captain. It was only sworn that the plaintiff had no family connexions in England, and had no permanent residence there, but had merely a temporary residence in Middlesex; and that when the plaintiff's wages were spent he would have no means of obtaining a livelihood but by going to sea; and that after putting the plaintiff to

considerable expense, it was believed he would abscond before payment of the costs could be enforced against him, unless he was compelled to give security. Mr. Justice Erle said, in *Oliva v. Johnson*, that it appeared that the plaintiff had a permanent residence abroad, except during occasional visits to England.

O'Grady v. Munro (7 Grant 106), does not apply because the plaintiff, who was a native of the province, swore he had returned to the province with the intention of becoming a settled resident, and that he had no idea of withdrawing from the jurisdiction of the Court.

Gill v. Hodgson (1 U. C. Prac. Rep. 381), decided in Chambers, shews that upon its being sworn that the plaintiff's residence was in England; that he usually resided there: that he was, at the time of the application, or was quite lately a merchant in business in Manchester; that he had no house or permanent residence in Upper Canada, and had permanently resided in Manchester, and that although at present in Upper Canada, yet he had no intention of permanently residing here; and that he had informed the defendant he had come to Upper Canada solely to attend to the suit; and that he did not intend to reside here permanently, but only until the suit was decided; and that he had only come to Upper Canada within the past few weeks, and had no property in Upper Canada as it was believed—that it was a fit case for security for costs to be given; although the plaintiff answered this affidavit by shewing that he had been in Toronto for about three months; that he had no intention of returning to England to reside at any definite period; that Toronto was his place of residence; that he had no permanent place of residence; and that he had brought out a quantity of merchandise with which he intended trading in Toronto.

Sir John Robinson pronounced his judgment in the following words:—"Following the authorities in the Queen's Bench in England, as it is proper we should when the Courts differ, I order the security to be given; the plaintiff does not contradict what the defendant has sworn; he told the defendant he was only come out to collect the debt and

would go home as soon as the case was decided. The plaintiff's affidavit is made in evasive terms."

From the decisions which I have referred to, the rule in the Common Pleas and in the Exchequer seems to be this:—"That security for costs will not be required from the plaintiff, if it appear that he is a resident in the country, even although he is frequently abroad, if it appears he intends to remain in the country until the trial or judgment in the cause."

It is not necessary, according to the decisions in the Exchequer, that the plaintiff should declare his intention permanently to reside in the country, for as Mr. Baron Alderson remarks:—Such a statement would be of very little avail, for he might change his intention the moment judgment had been obtained." Perhaps something more may be required of a plaintiff than his mere residence in the country to excuse him from giving security for costs, although the words of Mr. Baron Alderson would seem to imply that mere residence in the country is alone sufficient to preclude security for costs from being demandable; for he says—"The fact of his being actually resident here is the true criterion by which the question is to be settled."

Now, I am inclined to think if a resident of the country were to declare his intention of leaving for abroad at once, and had sold off his property and made other preparations for an immediate departure, with the intention of residing abroad—that upon these facts being shown the party might be called upon to give security, according to the general practice, notwithstanding the plaintiff was still actually a resident here; for if the plaintiff could not under such circumstances be called upon to give security, neither could he be required to give it, even if he were actually on his journey for abroad, nor until he had passed the boundaries of the province; and this, I think, would be permitting an unreasonable relaxation of the rule which was framed for the benefit of the defendants, and which ought to apply as much when the plaintiff is en route for abroad, as if he were then actually abroad.

His presence here for some time appears to be the object of the rule, and the declared intention of the plaintiff to absent himself at once and reside abroad should entitle a defendant to call for security, as much so as the declared intention of a defendant to abscond forthwith should entitle a plaintiff to arrest him to secure his appearance.

If then the plaintiff must not only be a resident at the time when the application for security is made, but should intend to remain in the country for some time after the application is made, the question is for how long should it appear that the plaintiff will be a resident here?

In the Exchequer it is held to be sufficient "that he intended to remain until after the trial, or that he intended to remain here until after judgment."

The rule in the Queen's Bench, as collected from what the Chief Justice said in the case of *Drummond v. Tillinghist* (16 Q. B. 740), may perhaps be this, although it is not very clear that any positive rule was laid down in that case—"That a foreigner in England, having his domicile out of the country may be called upon to give security for costs." Domicile is probably used rather loosely, and may be intended for "general or permanent residence;" for Mr. Justice Erle says—"Oliva v. Johnson was the only case supporting Mr. Greenwood's position, but the party was shewn to have had a permanent residence abroad, except during occasional visits to this country."

There may, therefore, be said to be a conflict between the Courts in England. The Common Pleas and Exchequer hold it a sufficient answer to a demand for security for costs that the plaintiff, although a foreigner, is an actual resident in England, and intends to remain in England until after the trial or after judgment; while the Queen's Bench may be said to hold that if it appear the plaintiff is an actual resident in England, and has not his domicile or permanent residence elsewhere, he will not be called upon to give security for costs.

It will thus be seen that in the Queen's Bench a person who has no domicile or permanent residence is in a better

position than one who had a fixed domicile or permanent residence; for Lord Campbell says—"The plaintiff seems to have no domicile either at California or elsewhere, which, with much reason, gave cause for the complaint of Mr. Greenwood, that a person having no permanent place of residence or domicile was thus much better off than a person who had one; while the rule, one would think, ought to operate more stringently against a mere vagrant, as the plaintiff seemed to be, than it should against a person having a permanent abode." Mr. Greenwood said—"In reason it cannot be that if a man is brought here from China, and his domicile not known, that should exempt him from giving security, when otherwise it would be required. According to the rule which has been suggested, the more a foreigner is itinerant, and the less that is known of his former residence and connexions, the less shall he be liable to find the security.

It is better by far to adopt the rule of the two Courts, that if the plaintiff be in England and intend to remain there till the trial or judgment, no security shall be demandable, than the rule of the Queen's Bench founded upon the case referred to, which excuses a mere vagrant from giving security at all, simply because he is in England and is not a vagrant. Justly considered, the practice of the Queen's Bench operates more advantageously to defendants than the practice of the other Courts does in those cases where security is the most required; and on the other hand it operates more harshly against plaintiffs who are not itinerants and vagrants, but who have fixed domiciles and permanent places of residence abroad, for it compels them to find security for costs, although they may intend to reside in England until the litigation has been entirely finished, merely because they are not permanent residents in the country.

One may say what a permanent residence is, but it may be much more difficult to say what is not permanent residence; and if it mean for a longer time than the termination and settlement of the particular suit, it is not reasonable that the Court should require more than the purpose itself requires.

In every way, then, in which the question can be considered, I think the rule of the Common Pleas and Exchequer is, in this particular, the most satisfactory, and most reasonable, and the one which I shall feel disposed to follow, unless I am controlled by the practice of our own Courts.

The only case which has been referred to as applicable in this country is the case of *Gill v. Hodgson* before mentioned, decided before Sir John Robinson in Chambers. Now this, although only a Chambers' decision, is nevertheless the decision of a very able Judge. The Chief Justice there expressed the conflict of opinion between the Courts in England, and felt the difficulty he was under in determining in the face of such difference. He had, therefore, to decide which course of practice he would follow; and he took the rule of the Queen's Bench as the one which, in his opinion, should govern us in this country under such circumstances.

I am not prepared, I must say, to adopt as a rule, that we are to follow the decisions of the Queen's Bench in England more than those of the other Courts, and more particularly as the effect there is not to diverge from the decisions of each other, but to reconcile their differences, and to have a common and harmonious rule, decision and practice in every case. I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English Court, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one Court or the other.

It is singular too that in the case just quoted, which was decided in December, 1855, the cases of *Tambisco v. Pacifico*, (7 Exch. 816), and *Drummond v. Tillinghist* (16 Q. B. 740), although decided about four years before that time, do not appear to have been cited, which necessarily lessens for the present day the effect of the judgment which was then given. But even in that case it is not the decision of the Court of Queen's Bench in England, in *Drummond v. Tillinghist*, for it was distinctly sworn to by the plaintiff, in *Gill v. Hodgson*, "That the plaintiff had no other permanent place of residence than Toronto," which brings the case most expressly within

the rule of the English Court of Queen's Bench, that upon such a statement security would be refused, and which decision, as has been seen, goes far beyond what is required by the other Courts, for the plaintiff to strive to exempt himself from giving security.

I am therefore of opinion that there is no decision in this province binding upon me, or contrary to the view which I have expressed, that if the plaintiff be actually a resident in the province at the time of the application for security for costs, and intended to remain here until after trial or judgment in the cause, security for costs should not be ordered to be given to him.

The question then is, does it appear here that the plaintiff is a resident in the province, and that he intends to remain here until after trial or judgment? Mr. Paterson says the plaintiff is here temporarily, and he believes the plaintiff will leave permanently before the defendants (if successful) could enter judgment for their costs. Mr. Heward says: "I understood the plaintiff to say he was going to prosecute this action, and see the matter through and that he intended to stay in the country for that purpose. Mr. Kendrick does not add to this, excepting the fact that the plaintiff has sold his effects and removed his family to Quebec, on their way to England, and that the plaintiff himself also intends to go there. But, he adds, "he believes the plaintiff is remaining here to prevent the defendants obtaining security for costs," which, perhaps unintentionally altogether, disposes of the effect of his affidavit. The defendants further rely on the plaintiff's own affidavit filed on a former occasion, in which he describes himself in this last month as of Hitchin, in England, and in which he says he had purposed to go to England, his domicile, with his wife and children. He also says, "My residence is not, nor has it since the 18th of July been, within the United Counties of York and Peel, but I am now a temporary sojourner in this city, and within the said counties." From this same affidavit it appears plaintiff's residence has for some years previously been in the County of York, and that, excepting for the time he was absent in Quebec on his way

to England, as he had intended, he does not seem to have had any other residence.

The mere description by the plaintiff of himself as of "Hitchin, in England," cannot I think operate against him contrary to the facts of his actual residence in Upper Canada, any more than the description by the plaintiff of himself in the case in *Gurney v. Key* (3 Dowl. 559), as of Trevilian Hall, Tregony, Cornwall, was allowed to help him against the fact of his actual foreign residence on the continent.

The plaintiff then speaks of England being his domicile and probably it is so. But the domicile is very distinct from the place of residence, or even the place of permanent residence of a person. One may be many years abroad without ever losing his former domicile, and I cannot therefore lay any stress upon this statement.

The whole case then is reduced to this, whether the statements of Mr. Paterson or of Mr. Heward, or of both together, are sufficient to make out—

1. That the plaintiff is not a resident here, or
2. That he does not intend to reside here until the trial or until judgment.

My opinion is they do not. It is quite clear the plaintiff is a resident here. I think it does appear very strongly that the plaintiff does intend to stay in this country to see "the matter through" as the witness calls it, which "matter" I understand, means this suit, and "seeing it through," I presume, must mean seeing the end of the suit, which is certainly after the trial, and probably after judgment.

I think, then, upon the whole facts I cannot order security for costs to be given; although it is quite possible plaintiff may see the judgment entered against him, if it be adverse to him, and then remove himself from the country, which (as suggested in *Tambisco v. Pacifico*, 7 Exch. 816), a plaintiff may do, even if it had been before shewn that he had intended to be a permanent resident in the country.

In many cases it is, perhaps, of very little consequence whether a plaintiff, against whom judgment be entered for costs, is or is not within the country. He was formerly

required to be personally within it, or to give security in substitution for it, because his person was liable to be taken for the costs of the action. In *Pray v. Edie* (1 T. R. 267), Mr. Justice Buller says the reason why security for costs is given is, that if a verdict be given against the plaintiff (who is abroad) he is not within the reach of our law so as to have process served upon him for the costs. So in *Barret v. Power*, above referred to, Baron Alderson says—"The reason why security for costs is required from a person abroad is, that if judgment is obtained against him, it cannot be enforced against him by process of the Court. In *Earl Ferrars v. Robins* (2 D. P. C. 636), security for costs was not ordered, because, as the plaintiff was a peer, the substitution for personal responsibility could not be ordered when the person of the peer was protected from arrest.

A different rule in this respect prevails in Chancery, see *Lord Aldborough v. Burton* (2 M. & K. 401), because it is said, although he cannot for his privileges be arrested for costs, that his absence nevertheless lessens the defendant's chance of getting payment of them.

But if the plaintiff in any action be an insolvent so that nothing can be made upon any process sued out on judgment against his supposed property; and if his person be safe from arrest for costs, as it is in this province, the practical difference to a defendant of such a plaintiff being actually in the country to answer in contemplation of law the costs, in case of a judgment being recovered against him, and of such a person being out of the country and beyond the process of the Court altogether is scarcely appreciable, although it would be a great advantage to the defendant if he could procure security in such a case of absence, as it would be equally an advantage to him if he could procure security for his costs against an insolvent plaintiff resident in the country.

Some modification might properly be made in the law on this subject, by which, in certain cases, both plaintiffs and defendants might be ordered to give security against the costs which their litigation may be supposed unjustly to

occasion; for if there be such persons in fact as ill-used plaintiffs and honest defendants, the opposites of such persons are not altogether unknown to the law: but I have only to administer the law as I find it; and what I decide in this case is that, according to my view of the law as it is, the defendants cannot call upon the plaintiffs to furnish security for costs upon the materials laid before me; and, therefore, I discharge their summons, and direct that the costs of this application shall be costs in the cause for the plaintiff.

Summons discharged.

BIGGAR v. SCOTT ET AL.

Con. Stat. U. C. cap. 42, sec. 23—Action against a maker and endorser of note—Common counts struck out.

Where plaintiff, the holder of a promissory note made by one defendant and endorsed by the other, sued both defendants in one action, under *Con. Stat. U. C. cap. 42, sec. 23*, and at the same time declared against the defendants on the common counts for money paid and on an account stated, the latter counts, on the application of defendants, were struck out of the declaration.

[CHAMBERS, November 20, 1863.]

The declaration in this cause contained a count on a promissory note, made by one defendant and endorsed by the other.

It also contained the common counts for money paid and on an account stated.

M. B. Jackson obtained a summons calling on plaintiff to shew cause why the common counts should not be struck out of the declaration with costs.

John Paterson shewed cause.

JOHN WILSON, J.—It is not pretended that the plaintiff has any but the one cause of action against defendants. That cause of action is the promissory note made by the one

defendant and endorsed by the other. It is, in fact, a several cause of action, but sued as joint under the statute. None but causes of action joint in substance as well as form can be proved against defendants under the common counts. I do not, therefore, see the necessity of the common counts, and so will give effect to defendant's application to strike them out of the declaration.

Summons absolute. Costs to costs in the cause.

ADAMS V. GRIER.

Statute 23 Vic. cap. 42, sec. 4—Not applicable to a cause made a remanet.

Where a record had been entered for trial at an assize and made a remanet, it was held that so long as the order for a remanet remained in force, the cause could not, under statute 23 Vic. cap. 42, sec. 4, be sent to the County Court for trial.

[CHAMBERS, November 28, 1863.]

This was an action on the common counts for goods sold and delivered, goods bargained and sold, work, labor, and materials.

Pleas—never indebted and payment.

The record had been entered for trial at the last assizes for the United Counties of Huron and Bruce, and made a remanet.

John Paterson afterwards obtained a summons calling the defendant to shew cause why the issues joined in the cause should not be tried before the Judge of the County Court of the United Counties of Huron and Bruce at the next sittings thereof.

J. A. Boyd shewed cause, and contended, among other things, that the cause having been once entered for trial at the assizes, and made a remanet, the case was not one within the operation of statute 23 Vic. cap. 42, sec. 4.

JOHN WILSON, J.—The order of the Court where the cause was entered for trial is, that the record remain for trial. Until that order be rescinded or discharged the plaintiff cannot, in my opinion, have the cause tried in the County Court. I shall, therefore, discharge the summons, but without costs.

Summons discharged without costs.

IN RE LAVERNE BEEBE.

Habeas Corpus—Warrant of commitment.

1. Held, that a warrant of commitment which omits to state the place where the alleged crime was committed is defective.
2. Held also, that in favor of liberty, it is the duty of a Judge on a habeas corpus, when doubting the sufficiency of a warrant of commitment, to discharge the prisoner.

[CHAMBERS, December 2, 1863.]

On 25th November last application was made, in Chambers, to Mr. Justice John Wilson, on the part of Laverne Beebe, then a prisoner in the common gaol of the County of Lincoln, for a writ of habeas corpus.

The application was made upon an affidavit of the prisoner, to which was annexed a copy of the warrant, under which, it was said, he was detained in custody.

The writ of habeas corpus was granted, and on the same day issued, directed to the Sheriff of the County of Lincoln, and to the keeper of the common gaol of that county.

The following is a copy of the writ:

CANADA, } VICTORIA, by the grace of God, of the
 } United Kingdom of Great Britain and
 to wit: } Ireland, Queen, Defender of the Faith,

To the Sheriff of the County of Lincoln, and the keeper of the common gaol for the said County of Lincoln.

We command you that you have the body of Laverne Beebe, detained in our prison under your custody, as it is

said, under safe and secure conduct, together with the day and cause of his being taken, by whatsoever name he may be called in the same, before the Honourable the Chief Justice of our Court of Queen's Bench, or other Judge of one of Her Majesty's Superior Courts at Chambers, in Osgoode Hall, in the City of Toronto, immediately after the receipt of this writ, to do and receive all and singular those things which our said Chief Justice or other Judge shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honourable William Henry Draper, C.B., Chief Justice of our said Court of Queen's Bench, at Toronto, the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

C. C. SMALL.

Issued from the office of the Clerk of the Crown and Pleas, in the Court of Queen's Bench, in and for the United Counties of York and Peel.

C. C. SMALL.

Per statutum tricesimo primo Caroli Secundi Regis.

JOHN WILSON, J.

On 27th November last the writ was returned by the gaoler, and to the return was annexed the original warrant of commitment.

The following is a copy of the warrant of commitment:

PROVINCE OF CANADA,	{	To all or any of the Constables or
County of Lincoln,		other Peace Officers of the County
to wit:		of Lincoln, and to the Keeper of

the Common Gaol in and for the said County, at Niagara.

Whereas, Laverne Beebe was this day charged before me, William McGiverin, one of Her Majesty's Justices of the Peace in and for the said County of Lincoln, on the oath of Thomas Oswald and others, that the said Laverne Beebe did, on the sixth day of November instant, feloniously and unlawfully discharge a certain pistol, then loaded with gunpowder and divers leaden balls, at and against one Thomas

Oswald, with intent thereby then feloniously, wilfully, and of his malice aforethought, the said Thomas Oswald to kill and murder.

These are, therefore, to command you, the said constables or peace officers, or any one of you, to take the said Laverne Beebe and him safely convey to the Common Gaol at Niagara aforesaid, and there deliver him to the keeper thereof, together with this precept.

And I do hereby command you, the said keeper of the said Common Gaol, to receive the said Laverne Beebe into your custody in the said Common Gaol, and there safely to keep him until he shall be discharged by due course of law.

Given under my hand and seal this seventh day of November, in the year of our Lord 1863, at St. Catharines, in the said County of Lincoln.

W. MCGIVERIN, Mayor.

Robert A. Harrison, on the part of the prisoner, moved to be allowed to file the writ and return. He then, upon reading the writ and return, moved for the discharge of the prisoner, upon the ground that the warrant of commitment was defective, in this that it did not shew the place where the alleged crime was committed, and so, he contended, shewed no jurisdiction.

S. Richards, Q.C., for the Crown, argued that the warrant, being one for commitment in case of crime, did not require the same particularity as a magistrate's warrant in the case of the exercise of summary jurisdiction, and contended that the warrant was sufficient. He referred to Burns' Justice, title Habeas Corpus.

Robert A. Harrison, in reply, argued that in case of a warrant of commitment, issued by a magistrate acting ministerially, it is as much necessary to shew jurisdiction as in the case of a warrant issued by a magistrate acting judicially, and contended that the warrant in this matter did not shew jurisdiction, because it did not shew the locality of the crime. He referred to Hurd on Habeas Corpus, 367; Con. Stat. Can., cap. 102, sch. B.

HAGARTY, J.—I doubt the sufficiency of this warrant as against the objection taken, and, in favour of liberty, shall give the prisoner the benefit of the doubt, and order his discharge from custody. Magistrates should not omit any part of a prescribed form of commitment, lest the part omitted be material, and render the warrant invalid. I am inclined to think that the omission to state in this warrant the place where the crime was committed is a fatal objection to the warrant.

Order for discharge of prisoner.

IN RE LAVERNE BEEBE.

Burglary—Ashburton Treaty—Con. Stat. Canada, cap. 89—25 Vic. cap. 6—Form of Warrant.

Held that burglary is not an offence within the meaning of the Ashburton Treaty or the Statutes of Canada passed to give effect to the treaty.

[CHAMBERS, December 8, 1863.]

Robert A. Harrison, on 4th December, made application to Mr. Justice Hagarty for a second writ of Habeas Corpus to bring up the body of Laverne Beebe, alleged to be in illegal custody.

No sooner had the order been made for his discharge from custody, under the warrant mentioned in the previous case, than a second warrant authorizing his imprisonment for a different offence was placed in the hands of the gaoler.

It was contended that the second warrant was also defective; and the learned Judge to whom the application was made, upon perusing a verified copy of it, ordered the issue of the writ.

The writ was in the usual form under the Statute of Charles, and was directed to the Sheriff of the County of Lincoln, and to the gaoler of that county.

The gaoler, on 8th December, attended Chambers with

Laverne Beebe in his custody, and duly made return to the writ according to its command.

Annexed to the return was the original warrant under which the prisoner was detained in custody.

It was as follows:

PROVINCE OF CANADA, County of Lincoln, to wit:	{ To all or any of the Constables or other Peace Officers of the County of Lincoln, and to the Keeper of the Common Gaol in and for the said County, at Niagara.
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Whereas Laverne E. Beebe was this day discharged before me, John M. Lawder, Esq., one of Her Majesty's Justices of the Peace in and for the said County of Lincoln, on the oath of James L. Filkins and others, under the provisions of the Consolidated Statutes of Canada, chapter 89, and the said Laverne E. Beebe being brought before me, in his presence and hearing, it was proved and made to appear before me that the said Laverne E. Beebe was a party duly charged with two crimes committed in the State of New York, one of the United States of America, being within the articles contained in said statute, as follows, that an indictment was in due form of law found by the Grand Jury of the County of Oneida, in the said State, in September term, 1861, against the said Laverne E. Beebe, for burglary in the first degree, and that another indictment was found against the said Laverne E. Beebe, by the Grand Jury of the said County of Oneida, for burglary in the third degree, in June term, 1863, both said indictments, it being made to appear to me on oath, being found by Courts of the State of competent jurisdiction, duly certified to be in full force and virtue, on which said indictments, warrants were issued in due form of law for the arrest of the said Laverne E. Beebe, and it being further made to appear to me on oath of the said examination, had and held before me in the said town of Niagara, in the said county, that the said Laverne E. Beebe was and is the party named in the said indictments, and that the said indictments were and are still in full force, and the said James L. Filkins having produced before me on

the said examination the said warrants, and having clearly proved that the said Laverne E. Beebe is the party named in the said indictments and warrants on such examination, and the said Laverne E. Beebe having offered no defence or evidence on the said examination, and I, thinking the charges preferred against the said Laverne E. Beebe and the evidence of criminality adduced against him sufficient according to the laws of this Province, have certified all proceedings taken against the said Laverne E. Beebe, together with a copy of all testimony taken before me, to the Governor-General of the Province of Canada, so that such action may be taken thereon as is enjoined by the statute of Canada aforesaid, and have issued thereon this my warrant according to the said statute.

These are therefore to command you the said Constables of Peace Officers, or any of you, to take the said Laverne E. Beebe, and him safely to convey to the Common Gaol at Niagara aforesaid, and there deliver him to the Keeper thereof, together with this precept.

And I do hereby command you, the said Keeper of the said Common Gaol, to receive the said Laverne E. Beebe into your custody in the said Common Gaol and there safely to keep him until he shall be discharged by due course of law.

Given under by hand and seal, this eighteenth day of November, in the year of our Lord one thousand eight hundred and sixty-three, at Niagara, in the said County of Lincoln.

JNO. M. LAWDER, J.P., Lincoln.

Mr. Harrison, having had the writ and returned filed, moved for the discharge of the prisoner from custody on the following grounds:

1. That the warrant disclosed no offence within the meaning of the Ashburton Treaty or the statute passed to give it effect in Canada (Con. Stat. cap. 89).

2. That since the passing of statute 24 Vic. cap. 6, the sections of Con. Stat. Can. cap. 89, authorizing a Justice of the Peace to act in matters of extradition, have been re-

pealed, and so the warrant signed by a Justice of the Peace was void.

3. That whether signed by a proper officer or not, it was not in proper form, because it commanded the gaoler to keep the prisoner "until he should be discharged by due course of law," instead of "until surrendered according to the stipulation of the said treaty, or until discharged according to law" (Stat. 24 Vic. cap. 5, s. 2; *Ex parte Bessett*, (6 Q. B. 481); *In re Anderson* (11 U. C. C. P. 54, 64).

S. Richards, Q.C., shewed cause.

MORRISON, J.—I am satisfied this warrant cannot be supported. In my opinion, the first objection must prevail. It is needless therefore for me to consider either the second or the third. I direct the discharge of the prisoner.

Order accordingly.

SCOTT V. THE GRAND TRUNK RAILWAY COMPANY
OF CANADA.

Meaning of "costs in the cause"—Taxation of arbitrator's fees.

The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award, as follows; "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of \$201.50," it was held that the words "costs in the cause" meant the whole costs of plaintiff and defendants.

Held also, that arbitrators' fees may be referred to the Master for taxation.

[CHAMBERS, Jan. 23, 1864.]

This was an application to review the Master's taxation of costs to the plaintiff, and to direct that the costs of the plaintiff and defendants in the cause should be taxed and thrown together, and that one half of such costs should be borne by plaintiff and the other half by defendants; and further to direct the Master to consider if the charges made

by the arbitrators for their services be reasonable, and to decide if they are reasonable, on such evidence as may be brought before him.

The costs were taxed under an award which, so far as material on the question of costs, was in the following form: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of two hundred and one dollars and fifty cents."

The Master allowed plaintiff half of his own costs of the cause, but refused to tax the arbitrators' charges.

Beaty shewed cause in the first instance, and contended that as the award directed "that the plaintiff and defendants should each pay half the costs of the cause," that the decision of the Master was correct, the words "costs in the cause" having a technical meaning, and meaning only the costs of the successful party in the cause. That the Master had decided correctly in taxing only the plaintiff's costs in the cause and charging half of it to the defendants, the award substantially being in favour of the plaintiff. That as to the arbitrators' fees *prima facie* they were correct, and the Master was bound to take the same as correct until they were impeached, which could only properly be done by application to the Court. He cited *Walton v. Ingram*, (5 Jur. 462); *Day v. Morris*, (1 Dowl. N. S. 353); *Marshall on Costs*, 198, 432, 434.

Lauder, in support of the application, contended that the costs of the cause in the award meant the whole of the costs, and that they should have been taxed and thrown into hotchpot and then divided, each party to pay half. He further argued that the arbitrators' fees could be taxed like any other item. He cited *Bates v. Townley*, (19 L. J. Ex. 399); 2 *Chitty's Archbold*, 11 ed. p. 1671.

RICHARDS, C.J.—In relation to the costs, the reference stated that the costs of the cause in the award and reference

were to be in the discretion of the arbitrators. And the award on that point is as follows: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay the costs of the reference and the award, our costs of which reference and award as arbitrators we assess at the sum of two hundred and one dollars and fifty cents. Our said costs appearing in detail as follows:

Edwin H. Ruthland.

Attending Meeting, December, 1860, 3 days.....	\$24 00
Travelling Expenses	23 00
Attending in March, 1861, 4 days	32 00
Attending in August, 1862, 4 days.....	32 00
Travelling Expenses	33 00
Travelling Expenses	15 00
	<hr/>
	\$159 00

Henry Waiter.

Attending Meeting in March, 1861	\$8 00
Travelling Expenses	2 50
Attending in August, 1861	24 00
Travelling Expenses	8 00
	<hr/>

In all——\$202 50 "

There is no doubt that the phrase "costs in the cause" generally means the costs only of the party who is successful in the cause; and when referring to the costs of the proceedings that take place before it is ascertained who may be the successful party, it is a convenient mode of referring to them; and when the successful party is known, the costs follow to him as a matter of course. But where the successful party is known, there is not the same necessity of applying the same meaning to the words. If it had been intended that the defendants should pay only half of the plaintiff's costs in the cause, it could have been so stated with little difficulty. If that is the proper view to take of the effect of the words used in the award, then the reference to the plaintiff paying anything would be quite superfluous. If the arbitrators had simply awarded that the defendant should only pay half of the plaintiff's costs in the cause

that would be sufficient; but when they direct that each shall pay the costs of the cause, if the whole costs both of defendants and plaintiff are not meant, I do not see how we can give effect to that part which requires the plaintiff to pay half the costs. If the defendants are to pay half of the plaintiff's costs, and the plaintiff is to lose the other half and not to pay anything, then the word "pay" has a different signification as applied to plaintiff and defendants, though used at the same time as applicable to both. There is really no paramount reason why this should be so; and full effect may be given to the words used, by deciding that the words mean the whole of the costs in the cause, plaintiff's as well as defendants'; and as all the issues but one in the cause are found for the defendants, this would give them the costs of those issues, and will help the interpretation I give to the words of the award.

I am therefore of opinion that the "costs of the cause," as referred to in the award, mean the whole of the costs, as well those of the plaintiff as the defendants.

As to the amount charged by arbitrators for their fees being subject to being taxed by the Master, there can be now no doubt. In *Roberts v. Eberhardt*, (32 L. T. Rep. 36; S. C. 28 L. J. C. P. 74, in the Exchequer Chamber), the present Chief Justice Erle said, "In practice the arbitrator usually obtains his fee from the successful party, by keeping his award until he is paid. * * The arbitrator cannot judicially decide the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. If he pursues the usual course above suggested, the party made liable by the award may have the amount taxed, and then is liable to his opponent only according to the allocatur. * * * The decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favour."

Barnes v. Hayward, (1 H. & N. 742), seems an express authority in favour of the Master taxing the charges of the arbitrators. There the plaintiff paid the full amount charged by the arbitrators, and, on the taxation of the plaintiff's

costs, the Master deducted £132 from the amount of the arbitrator's charges. The plaintiff moved for a rule to shew cause why the Master should not review his taxation and allow the plaintiff the full amount paid by him to the arbitrators. This the Court refused to do. Pollock, C.B., said, "The plaintiff should not have made an exorbitant demand. The Master acted rightly in disallowing these exorbitant charges." The defendant on the same occasion moved to revise the costs, with a view to their being further reduced; and on consulting with the Master, after cause shewn against it, the Court ordered a revision on behalf of defendant.

In *Fitzgerald v. Graves* (5 Taunton 342), the arbitrator had awarded £121 to be paid to himself for arbitration fees. This sum the plaintiff paid in taxing the costs in the cause.

The item was objected to, but the prothonotary there, as the Master here, thought that as the sum had been awarded and paid, he had no authority to enquire into the unreasonableness of the amount. On a motion to review the taxation, the Court made the rule absolute.

This case seems sustained by the latter authorities. In *Dixie v. Alexander* (1 L. M. & P. 333), Baron Alderson, speaking of the arbitrator's fees, says, "If the defendant thinks them unreasonable, he should apply to have them referred to the Master, to be taxed in the same way as any other costs."

Threlfall v. Fanshawe, in the same reports, at p. 540, is an ably argued case and refers to many authorities on the point, though the decision of the case on some of the points is doubted in *Parkinson v. Smith* (30 L. J. Q. B. 17). See also *Frinton v. Branson* (20 L. J. Q. B. 17); *Rose v. Redford* (10 W. R. 91).

The learned Chief Justice subsequently made the following order:—I do order that the Master review his taxation of costs in this cause, and that the whole costs of the cause, both of plaintiff and defendants, be taxed, and then that the whole costs be paid, one moiety by each party, in pursuance of each award; and I further order that, on such revision of

taxation, the Master shall also consider, on such evidence as may be brought before him, the reasonableness of the arbitrators' fees, and tax the same as he shall think reasonable.

GLENNIE V. ROSS.

Capias—Arrest by the use of criminal process—Denial.

Where application was made for the discharge from custody of a defendant, arrested under a writ of *capias*, upon the ground that his arrest was procured through a trick, by means of the use of criminal process, which, when it had served its purpose, was abandoned, and the affidavits filed in answer, positively denied the trick and all collusion of every kind, the Judge without inquiring into the question, whether the arrest of defendant under the criminal process was legal or illegal, discharged the summons.

[CHAMBERS, February 5, 1864.]

Defendant obtained a summons calling on the plaintiff to shew cause why the arrest of the defendant under the writ of *capias ad respondendum*, issued, in the cause, should not be set aside, and the defendant be altogether discharged from the custody of the Sheriff of the County of Waterloo, on the ground that the defendant was collusively arrested in the City of Toronto, and taken to the Town of Berlin, in the County of Waterloo, under and by virtue of a warrant on a criminal charge, and on a charge that he had threatened to take the life of the plaintiff, for the sole purpose that he might be arrested under the said writ of *capias* at the said Town of Berlin, instead of the said City of Toronto, and that having been so arrested on said charge, and conveyed to said Town of Berlin, he was then given up by the officer who had him in custody on said charge, and conveyed to said Town of Berlin; he was then given up by the officer who had him under the said writ of *capias ad respondendum*, and on grounds disclosed in affidavit and papers filed.

Defendant swore that on Saturday, 16th January last, he was arrested under and by virtue of a *capias ad respondendum*

issued in this cause, and was then imprisoned in the common gaol at Berlin, in the County of Waterloo, and had ever since been detained a prisoner in custody under and by virtue of the said writ of *capias*.

That on 15th January last, he was arrested at Toronto by a constable who called himself detective Crowe, who arrested deponent under a warrant in his hands, issued by one William Hendry, a justice of the peace in and for the County of Waterloo, on the information of the above named James Glennie, in which said warrant it was stated that deponent had threatened to take the life of the said James Glennie; and the said detective Crowe at the time he so arrested deponent at Toronto, as aforesaid, informed him that he would take him before a magistrate in the said county of Waterloo, when deponent would be required to give sureties to keep the peace.

That accordingly the said detective took deponent to Police Station number one in the city of Toronto, and kept him there till late in the night, when the train was about leaving the railway station for Berlin and the west, when he and his assistant took deponent to the railway station, and thence by train to Berlin, where they arrived about three or four o'clock on the morning of Saturday, 16th of January last, and from the time of their arrival, until about nine o'clock, and until after deponent was arrested by the Sheriff's bailiff or deputy, under or by virtue of the said writ of *capias*, he was detained a prisoner under close watch by virtue of the said warrant by the said Constable Crowe.

That on the back of the said warrant was endorsed an affidavit of the plaintiff's attorney in this cause, testifying the genuineness of the signature of the said William Hendry to the said warrant; and about eight o'clock on the morning of Saturday, the 16th of January last, the said Crowe sent word (as he informed deponent) to the said attorney, giving him information that deponent was there in his (Crowe's) custody, and at the same time the said Crowe told deponent that he would immediately be brought before a magistrate to be bound over to keep the peace; and

he, the said Crowe, then went with deponent to the residence of a lawyer in Berlin, that he might employ counsel to appear before the Magistrate's Court, which deponent expected would be held forthwith, but soon after his return from the said lawyer's residence to the tavern where they were staying, the Deputy Sheriff, or bailiff of the Sheriff of the County of Waterloo, came into the same tavern and arrested deponent, under and by virtue of the said writ of *capias*, while deponent was in the custody of the said Crowe; and immediately after the said Deputy Sheriff, or bailiff, entered the said tavern, he was followed by the said attorney, and the said Crowe soon after deponent's arrest by the said Sheriff's bailiff, informed deponent that he had given deponent up to the said Sheriff's bailiff, and further said he was aware that deponent was to be arrested under the said *capias*.

That at the time he was so arrested under the said writ of *capias*, the said Sheriff's bailiff then served upon him a copy of the said writ, which said copy so served upon deponent was annexed to his affidavit.

That the said Sheriff's bailiff only arrested deponent under the said writ of *capias*, and did not take or hold him under the said warrant; but then soon after took deponent to the said common gaol, and deponent had ever since been a prisoner in custody under the writ of *capias*, and no further or other proceedings whatever had been taken against him, to his knowledge, on the said warrant; but he was informed the same was abandoned; in truth he, deponent, never threatened to take the life of the said James Glennie, nor did he make any other threats against him, nor did he give any reason or ground for the issuing of such warrant against him.

That at the time of his arrest in this suit, and at the time of his arrest under the said warrant, and at the time of making his affidavit he had not any intention whatever to quit Canada: and there was not then any reason for apprehending him under a writ of *capias* to prevent him leaving Canada, as it is his intention to remain in this country.

Robert A. Harrison shewed cause. He filed among others an affidavit of the attorney for the plaintiff, wherein it was sworn: that on the 26th day of September, last past, he issued concurrent writs of ca. re. in this cause, directed to the Sheriffs of York and Peel, and Waterloo respectively. That on the sixth day of January last, he sent his Chancery agents the said writ, directed to the Sheriff of the United Counties of York and Peel, to be put into the Sheriff's hands there, and instructed his said agents to request the Sheriff to appoint a detective or special bailiff for the purpose of making the arrest, for the reason that he did not think the Sheriff's officer could find the defendant, who, as deponent was informed, was keeping himself concealed. That in answer to his letters to his agents, he received a letter stating that the Sheriff was not willing to appoint a special bailiff, but that they had asked the detective, who knew of Ross's whereabouts, to point out the defendant to the Sheriff's bailiff; and in said agent's letter there was enclosed a magistrate's warrant which had been in the hands of the detective (and which deponent since learned had been sent to him by the plaintiff himself without deponent's privity) for the purpose of having proof of the signature of Mr. Hendry, the magistrate issuing the said warrant; being well acquainted with Mr. Hendry's signature, deponent made the affidavit himself, and returned it to his agents.

That he had enquired at the Sheriff's office in Toronto, and found that a concurrent writ of ca. re. in this cause was received in said office on the 17th day of January last, and remains there still. That about eight o'clock on the morning of the 23rd day of January last past, a person representing himself as the assistant of detective Crowe, called at deponent's house and informed deponent that detective Crowe was at the hotel in Berlin, with the defendant in charge upon a magistrate's warrant, and that they had sent for the plaintiff. Deponent said to him that since the defendant had been arrested upon a warrant, the detective should take him before a magistrate so soon as the plaintiff arrived. That soon after deponent went to his

office, and had only been a few minutes there, when the bailiff of the Sheriff of Waterloo came to him, and said that the defendant, against whom he had a writ of ca. re., was in Roat's Hotel. Deponent told him to keep a watch upon defendant, and as soon as the detective had disposed of him on the warrant to arrest him. The bailiff then left deponent's office, and a few minutes afterwards deponent went into Roat's Hotel, which is about forty yards from his office, and went into the bar room, and found the person who came to his place in the morning, the Sheriff's bailiff, and a person whom the Sheriff's bailiff introduced to deponent as Ross, the defendant, and one other person whom deponent did not know, and did not speak to, but who on the afternoon of the same day, some hours after Ross, the defendant, had been in gaol, deponent was told, was detective Crowe. After being introduced to the said defendant by the said bailiff, as aforesaid, deponent was speaking with the defendant, when Mr. W. H. Bowlby, barrister of Berlin, came into the bar room and called out defendant, and the person whom he afterwards understood was detective Crowe. Deponent then left the hotel and went to his office, fully expecting that the defendant would be taken before a magistrate, and held to bail upon the plaintiff's information; after which deponent certainly did intend to have him arrested on the writ of ca. re., then in the Sheriff's hands, in this cause, and was greatly surprised when he heard in the afternoon that he was in custody of the Sheriff before he had been taken before a magistrate.

Deponent positively swore that there was no collusion between him and the attorney of the said plaintiff, or otherwise, and the said detective Crowe, to have the said defendant brought to the County of Waterloo on the said warrant, for the purpose of having him arrested on the said writ of ca. re. in this cause, nor did he, deponent, ever speak or write to the said Crowe on this subject, either on the occasion above referred to, or any other.

He also filed an affidavit of plaintiff, wherein was stated the information which led him to the belief that defend-

ant threatened his life, and wherein it was most positively sworn that there was no collusion between him and detective Crowe, to have defendant brought from Toronto to the County of Waterloo, there to be arrested on civil process; but on the contrary thereof, he caused the peace warrant to be issued against defendant in good faith, and never abandoned it.

Other affidavits to which it is not necessary to refer, were filed in corroboration of those made by plaintiff and his attorney, denying collusion, &c.

Mr. Harrison then argued that the application of defendant was rested on the alleged ground of collusion or a trick; that the affidavits which he filed displaced that ground; that if there was no trick it was clear that a person arrested on criminal process might be afterwards detained on civil process, even at the suit of the party who had caused him to be arrested on the criminal charge—*Palmer v. Rodgers*, (6 U. C. L. J. 188). But even if a trick were shewn and not answered, unless the trick were designed to gain an advantage on criminal process, which a party could not obtain on civil process, such as an arrest on a Sunday, that the trick per se was no ground for prisoner's discharge.—*Willis v. Guernsey* (8 B. & C. 771); *Mackie v. Warren* (5 Bing. 176); *Jacobs v. Jacobs* (3 Dowl P. C. 675), *Re Ramsden* (15 L. J. Q. B. 264, M. C.), *Stein et al. v. Valentizen* (27 L. J. Q. B. 236.)

D. McMichael, in support of the summons, contended that a peace warrant issued in Waterloo had no force in York and Peel, notwithstanding the endorsement. That the custody, therefore, both in York and Peel and Waterloo was illegal, and that whether a trick or not, plaintiff had no right to cause him to be arrested until he had completely regained his liberty from the illegal custody—*Webb v. Darwell* (Barnes, 400), *Ex parte Eggleton*, (23 L. J. M. C. 41); *Pearson v. Yewens* (5 Bing. N. C. 567).

HAGARTY, J.—I am not prepared to accede to Mr. McMichael's argument. The summons is rested on the ground

of collusion, and all allegations of collusion are contradicted by the affidavits filed on the part of the plaintiff. Mr. McMichael admits that he has no case directly in point, and in the absence of such I shall discharge the summons, leaving him, if he desires to do so, to move the Court against my order.

Summons discharged.*

CROSS V. WATERHOUSE.

Practice—Compelling plaintiff to bring in the record for the purpose of having judgment entered—Judge in Chambers.

Held, that a defendant who conceives he has a right to costs against a plaintiff, in consequence of plaintiff having recovered in a Superior Court an amount within the jurisdiction of an Inferior Court, is entitled to call upon plaintiff, either himself to proceed to the entry of judgment, or to bring in the record, in order that judgment may be entered by defendant.

Held also, that a Judge in Chambers has power to entertain the application and to make the order.

[CHAMBERS, February 11, 1864.]

Lauder obtained from Richards, C.J., a summons, calling upon the plaintiff to shew cause why the plaintiff should not bring in the Nisi Prius record in this cause, and have the judgment duly entered and docketed according to the practice of the Court, or why the plaintiff should not by his agent or attorney deliver the said record to the defendant, his attorney or agent, to have judgment entered herein, and pay the costs of the application, upon grounds disclosed in affidavits filed.

The affidavits shewed that the action was trespass for assault and false imprisonment, to which defendant pleaded not guilty and leave and license; that the cause was entered for trial at the last assizes for the County of Hastings; that it was tried, and resulted in a verdict of one shilling for the plaintiff; that the learned Judge who tried the cause had not certified for costs; that notwithstanding the de-

*Defendant did move against the order.—Rep.

mand of defendant, plaintiff, who had taken the record out of Court, refused either himself to enter judgment, or deliver the record to defendant to enable him to do so.

Robert A. Harrison shewed cause. He submitted that plaintiff was entitled to the postea, and that it was in his discretion to enter judgment or not as he saw fit; that the defendant shewed no reason for asking to have the record delivered to him; that even if it were delivered to him, he had no right against the will of plaintiff to enter up judgment for plaintiff; and that at all events a Judge in Chambers had no power to make the order that was asked. He referred to *Taylor v. Nesfield* (4 El. & B., 462).

Lauder contra, argued that defendant was entitled to judgment entered, in order that if he was entitled to costs against the plaintiff the costs might be taxed and form part of the judgment. He also contended that a Judge in Chambers had power to make the order. He referred to *Engler v. Twisden* (4 Bing. N. C., 714); *Newton v. Boodle* (5 C. B., 206); *Chut v. Bunnell* (25 L. J. Q. B., 98); 1 Chit. Archd. 11 edn. p. 525.

MORRISON, J., having taken time to consult the Judges of both Courts, made the summons absolute, but without costs. He ordered plaintiff within ten days to bring in the record for the purpose of having judgment entered.

Order accordingly.

GLENNIE V. ROSS.

Con. Stat. U. C. cap. 22, sec. 33—Rule T. T. 20 Vic., No. 100—Time to declare against a prisoner—Effect of not doing so.

Held, that under sec. 32 of the Common Law Procedure Act, coupled with Rule No. 100 of 20 Victoria, a plaintiff is bound to declare against a defendant in close custody, within the term next after the arrest.

Held also, that the fact that defendant had, during the term, made application for his discharge from custody, which application was refused before the end of the term, was no sufficient excuse for not declaring during the term.

Held also, that a defendant once supersedeable is always supersedeable.

[CHAMBERS, February 23, 1864.]

Defendant, on the authority of *Tyson v. McLean*, 1 Prac. Rep. 194, obtained a summons calling on plaintiff to shew cause why the defendant William Ross should not be absolutely discharged out of the custody of the Sheriff of the County of Waterloo, under the *capias* issued against him in this cause, on entering a common appearance, on the ground that the defendant being a prisoner in the close custody of the said Sheriff, in the gaol of the said county, under the said writ of *capias* in this cause, and having been arrested thereon before the last Hilary Term, no declaration in this cause was filed and served on the defendant before the end of the term after his arrest; and no declaration has yet been filed against the defendant, contrary to the rule and practice of this honourable Court, in that behalf, and on grounds disclosed in affidavits and papers filed.

Defendant swore that he was arrested by the bailiff of the Sheriff of the County of Waterloo, under and by virtue of a writ of *capias ad respondendum* in this action, on the 16th day of January last, and was then taken into custody upon the said writ, and was imprisoned for want of sureties for his appearance thereto, and ever since he was arrested had remained in the common gaol of the said County of Waterloo, at the Town of Berlin, a prisoner in custody, under the said writ of *capias ad respondendum*, which said writ was

issued from the office of the Deputy Clerk of the Crown and Pleas in and for the said County of Waterloo, on or about the 13th day of December last. That he had not been served with any declaration in this cause, and was informed by the Deputy Clerk of the Crown that no declaration had been filed. That he had not put in special bail, but ever since the said 16th day of January last, had remained charged in custody upon and under said writ.

There was filed an affidavit of the gaoler, wherein he swore that no declaration had been served on him, or given to him in this action.

There was also an affidavit of the Deputy Clerk of the Crown, to the effect that on the 18th of February, 1864, he made due search in his office, for the purpose of ascertaining if a declaration had been filed in this action, and that no declaration had been filed.

Robert A. Harrison shewed cause. He filed an affidavit of the attorney for the plaintiff, wherein it was sworn that on the 22nd January last, the defendant made application to a Judge in Chambers, to be discharged from the custody of the said Sheriff, on the ground that he had been arrested by trick and collusion. That the summons obtained on the said application was discharged by Mr. Justice Hagarty, the judge presiding in Chambers. That when his agents in Toronto advised him that the said summons had been discharged, they also informed him that the judge had granted the defendant leave to apply to the full Court to be discharged, on the grounds aforesaid, and his agents further stated that they understood the defendant intended to apply in term. That owing to the uncertainty of the defendant's action in this respect, and waiting to see if he would apply to the full Court during its sittings which ended on the 14th February last, he did not file and serve a declaration in this cause, as he should otherwise have done. That he was instructed by the plaintiff to declare in this cause, and take the same down to trial at the present Spring Assizes, to be held in and for the County of Waterloo, on

the 21st day of March, 1864. That he verily believed if the defendant was discharged from custody, without giving bail in this cause, the plaintiff would lose the benefit of any verdict he might obtain herein.

An affidavit of Mr. McMichael was filed in reply.

It also appeared that plaintiff had, on the Monday following term, obtained a summons for further time to declare, which was still pending at the time of this application.

Mr. Harrison argued that there is now no practice making it obligatory upon a plaintiff to declare against a defendant in custody during the term next after his arrest, so long as plaintiff proceeds to trial in the term next after issue joined, and causes defendant to be charged in execution within the term next after trial. That the old practice was to bring the prisoner into court by writ of habeas corpus, in order to receive the declaration. That sec. 32 of the Common Law Procedure Act, which enacts that if any defendant be taken or charged in custody, &c., the plaintiff may, before the end of the term next after arrest, declare against him, &c., was merely an enabling statute. That the word "may" as used in it, was permissive, not obligatory (Con. Stat. U. C. cap. 2, sec. 18, sub-sec. 2). That *Tyson v. McLean*, was decided under statute 12 Vic., cap. 73, sec. 24, and determined that Rule No. 100 must be received as interpreting "may" as used in 12 Vic., cap. 73, to mean "must." That Rule No. 100 having been made before the Consolidated Statutes became law, cannot be looked to as putting an interpretation on these statutes. That even if "may" as used in Con. Stat. U. C. cap. 22, sec. 32, were read "must," it did not mean "must," under all circumstances, and that the attorney for plaintiff in this case had shewn sufficient cause for not declaring during the term next after the arrest (2 Chit. Archd. 9 Edn. 1140, 1141). And whether or not a summons having been obtained for further time to declare before this application was made, the summons ought to be made absolute and the application fail.

M. C. Cameron, Q.C., contra. Even if sec. 32 of Con.

Stat. U. C. cap. 22, were read as an enabling section merely, still it enacts that the plaintiff is to declare in the manner and according to the directions contained in the 100 and 132 Rules of Trinity Term, 20 Vic. That the effect of this stipulation is to incorporate with the statute the rule No. 100, to which reference is therein made, and that by the terms of that rule, in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias*, &c., the plaintiff in such process shall declare against such defendant, before the end of the next term after such arrest, &c., otherwise such defendant shall be entitled to be discharged from such arrest, &c., upon entering a common appearance, unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge. That *Tyson v. McLean* is as much law since the Consolidated Statutes as before them. That plaintiff having neglected to declare during the term next after the arrest, defendant immediately after the last day of term became and was supersedeable. That being once supersedeable he was always supersedeable. That the summons for further time to declare not having been obtained and made absolute during the term, could not affect defendant's right to be discharged—*Horner v. Spencer* (1 F. & F. 412). That no sufficient excuse was shewn for not declaring within the time limited by the statute and rule.

MORRISON, J., having taken time to consult his brother Judges as to the proper interpretation of sec. 32 of the Common Law Procedure Act, made the summons absolute for the discharge of defendant from custody, upon entering a common appearance.

Order accordingly.

HALL V. BROWN.

Arrest set aside upon condition of no action being brought—Subsequent action stayed—Effect of Judge's order when not reversed.

Where a person in custody under a writ of *capias* had obtained a Judge's order for his discharge, upon condition that he should bring no action for the arrest, and afterwards acted upon the order, he was held bound by its terms in its entirety, and an action for malicious arrest subsequently brought by him against the party who caused the issue of the writ of *capias*, was stayed with costs. *Graham v. Thompson* (16 U. C. R. 259), held inapplicable to the present state of the law.

So long as a Judge's order stands unreversed by the Court, a Judge in Chambers will assume that neither party is dissatisfied with it. [CHAMBERS, February 24, 1864.]

Moss, for the defendant, obtained a summons calling on the plaintiff to shew cause why all proceedings in this cause should not be stayed, on the ground that the same was brought against good faith and contrary to the conditions on which an order was granted to the plaintiff, in a suit of the now defendant as plaintiff, against the now plaintiff as defendant, and on grounds disclosed in affidavits filed.

The papers filed shewed that the now plaintiff was arrested at the suit of the now defendant on a *capias*, and that a Judge on the 26th of November last, on an application by the now plaintiff for that purpose, set aside the arrest upon a common appearance being entered to the *capias*, and upon the condition that the now plaintiff should bring no action against the now defendant for the said arrest, that the now plaintiff took out the Judge's order embodying such condition and served it on the now defendant, and that he was bringing this action in breach of the condition of the said order.

The present action was brought, for that the now defendant having no reasonable or probable cause for believing and not believing, that the now plaintiff unless forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally, or the now plaintiff in particular, but intending to injure the plaintiff falsely and maliciously represented that such was the fact, and thereupon maliciously procured a Judge's order for the issue of bail-

able process against the plaintiff and caused the plaintiff to be arrested and held to bail for \$500, by reason whereof, &c.

H. B. Morphy shewed cause and contended that on the authority of *Graham v. Thompson* (16 U. C. R. 259), the condition in the order restraining an action is illegal, or if not altogether so that it did not apply to such a form of action as the present for special damage which the plaintiff had sustained, and for which he would have been entitled to sue if he had never interfered with the arrest.

Moss, supported the summons.

ADAM WILSON, J.—In *Graham v. Thompson*, the order was in form similar to the present one, the subsequent action brought was similar to the present, and an application of a similar kind to the present application was then made to set aside all the proceedings in such subsequent action, on the ground that it was brought in violation of the condition in the order. The Chief Justice in giving judgment said, “It is true the condition is not in words confined to an action of trespass, but it has always been understood that such is the intention and effect of it, and the case of *Lorimer v. Yule* (1 Chit. Rep. 134), is an express authority in point; the condition means only that the defendant, who has been discharged from arrest, shall bring no action which he could not have brought unless the writ had been set aside.” The rule in that case was therefore discharged.

This decision was pronounced in Hilary Term, 21 Victoria, which would be in February, 1858, and as the law then stood in this Province, a Judge had not in general the power to set aside the arrest on the merits; his powers were confined to cases of irregularity or invalidity of the proceedings, and so the arrest in that case must have been set aside on the ground of such irregularity or invalidity merely. The condition of bringing no action could apply only to the not bringing an action against the party in respect of such irregularity or invalidity, or in other words, to the not suing the plaintiff for anything which the Judge had jurisdiction over, and had adjudicated upon. But by the 22 Vic., c. 96. secs. 8-10, passed in August, 1858, and now embodied in

the Consolidated Statutes for Upper Canada, ch. 22, sec. 31, it is provided that any person arrested on a *capias*, may apply to the Court or a Judge for a rule or order on the plaintiff, to shew cause why the person arrested should not be discharged out of custody, and the Court or Judge may make absolute or discharge such rule or order, and direct the costs of the application to be paid by either party, or make such other order therein as to the Court or Judge may seem fit, &c.

By this Act there is now power conferred upon the Court or a Judge to try the propriety or rightfulness of the arrest upon the merits. Affidavits may be and are received, to disprove the allegations made by the plaintiff, and upon which he procured the order for the *capias*. Affidavits may be put in on the other side, to repel the defendant's facts and to confirm the original case against the defendant. The Judge must then determine whether he is satisfied that the plaintiff has a cause of action to the amount of \$100 or upwards against the defendant, and whether there are still "facts and circumstances which satisfy him" that there was probable cause for believing that the defendant was about to quit Canada, with intent to defraud the plaintiff. If the Judge be clearly not satisfied of either of these facts charged against the defendant, or if he believe that both or either of these charges are or is untrue, he would set aside the arrest, or if he be left in doubt on either point he might, giving the benefit of the doubt in favour of personal liberty, rather than in favour of the existing proceeding, which is entitled to some presumption in its favour, discharge the defendant. In the last mentioned case, the Judge might say, "entertaining this doubt, it is, so far as I can determine the matter, no condemnation of the plaintiff, and therefore, if I do relieve the defendant, I shall only do so upon the condition that he shall not bring an action against the plaintiff, in respect of the matters which have been submitted to me relating to his arrest." I do not say a Judge would so act in such a case, but he might do so, although his better course would not be to interfere, that is not to set aside anything which he is not con-

vinced should be set aside. But assuming that he did nevertheless interfere, and did impose such terms, and the defendant did not object, but expressly assented to them, it is only reasonable, as he takes the benefit of the order as to his discharge, that he should be bound by it as to the condition.

I am not altogether prepared to say that if a defendant in such a case were to state to the Judge that he did not agree to such a condition, but he would submit to it in the meantime, reserving his right to appeal to the Court for the removal of the condition that he would be precluded from making such application to the Court; although he might not be able to do so, for the case of *Hayward v. Duff* (12 C. B. N. S. 364; 6 L. T. N. S. 433), is very strongly against him even to this extent, for that case decides the order must be taken in its entirety, the burden with the benefit.

The cases of *Carpenter v. Pearce* (27 L. J. Exch. 143); *Tinkler v. Hilder* (4 Exch. 187); *Pearce v. Chaplin* (9 Q. B. 802); *Simmons v. King* (9 Jur. 250); *Atherton v. Heard* (8 Jur. 753), are very material as shewing how far Judges' orders, when not acted upon, are binding upon the parties. So long as the order still stands, not "discharged or varied by the Court," I must assume that neither party is "dissatisfied" with it, and that it is therefore binding upon both of them.

The order will be to set aside all proceedings taken by the now plaintiff, contrary to the order of Mr. Justice Morrison, dated the 26th November, 1863, with costs.

Order accordingly.

McCARTHY v. OLIVER.

Replevin—23 Vic. cap. 45, sec. 2—Sale of growing timber—Lien for price—Trover.

Where plaintiff, being the owner of timbered land, verbally agreed to sell growing timber to defendant and there was a dispute as to price, it was held that the property in the trees passed as soon as severed from the freehold, but that plaintiff had a lien upon them for the price, and therefore that defendant without discharging the lien had no right to remove the timber.

Semble, trover may under such circumstances be maintained by the owner of the land against the vendee of the timber.

[CHAMBERS, February 25, 1864.]

D. McMichael, on the part of the plaintiff, obtained a summons under and pursuant to sec. 2 of the act amending replevin in Upper Canada (23 Vic. cap. 45) calling on the defendant to shew why an order should not be granted, authorizing the delivery of the property detained under the writ of replevin in this cause to the plaintiff by the sheriff of the County of Simcoe, and authorizing the said writ of replevin, and directing the said sheriff to whom the writ was directed to replevy the goods mentioned in the writ, in accordance with the instructions contained in said writ, and on grounds disclosed in affidavits filed.

It appeared that plaintiff and defendant had agreed respecting certain trees; that plaintiff was the owner of the land on which the trees grew; that defendant had the right to cut whatever trees he required for the purpose of making them into timber: that no time was mentioned as to the time of payment: that there was a difference as to the price to be paid; that the defendant entered on the land and cut the trees and manufactured them into timber and paid the plaintiff about \$25 on account. The whole price was, as the defendant swore, about \$140; but as the plaintiff swore, about \$300. Plaintiff also swore that he notified defendant not to remove the timber till the price was paid; but that the defendant nevertheless hauled the timber off the plaintiff's land to a railway station to take it to the market.

Under these facts the plaintiff obtained a writ of replevin, and his present application was under the statute, for an order on the sheriff to deliver over to him the timber.

C. S. Patterson shewed cause. He contended that the property in the timber had passed to the defendant, that the plaintiff could not maintain trover, and therefore could not replevy.

D. McMichael supported the summons.

ADAM WILSON, J.—I have no doubt the property in the timber passed to the defendant, as soon at any rate, as the trees were severed from the land, but that the plaintiff, as the land was his on which the timber was lying, and as he had not been paid for the timber, had a lien thereon, and the defendant therefore had no right to remove the timber without first getting rid of the lien, and particularly he had no such right after the plaintiff had notified him not to remove the timber until he had first paid for it.

I am inclined to think on the authority of the cases of *Tansley v. Turner* (2 Bing. N. C. 151); *Tarling v. Baxter*, (6 B. & C. 360); *Acraman v. Morrice* (8 C. B. 449), that the plaintiff could, under the circumstances, maintain trover against the defendant for the removal of this timber from off the plaintiff's land.

I must order the sheriff to deliver up the timber to the plaintiff.

Order accordingly.

IN THE MATTER OF FRANCIS MARTIN.

9 *Geo. II.*, cap. 30—59 *Geo. III.* cap. 69—*Foreign Enlistment Acts*
—*Sufficiency of warrant.*

A warrant of commitment reciting that F. M. was charged on the oath of J. W., "for that he, F. M., was this day charged with enlisting men for the United States Army, offering them \$350 each as bounty" without charging any offence with certainty, without stating that the men enlisted were subjects of Her Majesty, and without showing that J. W. was unauthorized by licenses of Her Majesty to enlist, was held bad.

[CHAMBERS, March 2, 1864.]

Robert A. Harrison, on 16th of February last, obtained from Mr. Justice Morrison, an order for a writ of habeas

corpus to bring up the body of Francis Martin, alleged to be illegally in the custody of the Sheriff of the County of Welland.

On the same day the writ of habeas corpus was issued from the proper officer of the Court of Queen's Bench.

The writ was in the following form:—To the keeper of the common gaol, in and for our County of Welland. We command you that you have the body of Francis Martin detained in our said gaol under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken, by whatever name he may be called in the same, before the Honorable the Chief Justice of Upper Canada, or other Judge of one of the Superior Courts of Common Law for Upper Canada, presiding in Chambers at Osgoode Hall, in the City of Toronto, immediately after the receipt of this writ, to do and receive all and singular, those things which our said Chief Justice or other Judge shall then and there consider of him in this behalf, and have you then there this writ.

Witness, the Honorable William Henry Draper, C. B., Chief Justice of our said Court of Queen's Bench for Upper Canada, at Toronto, the 16th day of February, in the 27th year of our reign.

(Signed) CHAS. C. SMALL.

Issued from the office of the Clerk of the Crown and Pleas in the Court of Queen's Bench, in and for the United Counties of York and Peel.

(Signed) CHAS. C. SMALL.

Per statutum tricesimo primo Caroli Secundi Regis.

(Signed) JOS. C. MORRISON, J.

On the 29th February, the writ was returned by the gaoler to whom it was directed. The gaoler returned that Francis Martin was in his custody, under a warrant which was annexed to the writ.

The warrant was in this form:—

To all or any constables or other peace officers in the County of Welland, and to the keeper of the common gaol

of the County of Welland, in the said County of Welland. Whereas Francis Martin, of the City of Toronto, was this day charged before me, one of Her Majesty's Justices of the Peace in and for the said County of Welland, at Clifton, on the oath of James Welch, of Montreal, and others, for that he Francis Martin, was this day charged with enlisting men for the United States Army, offering them \$350 each, as bounty. These are therefore to command you, the said constables or peace officers or any of you, to take the said Francis Martin, and safely him convey to the common gaol at Welland, aforesaid, and there deliver him to the keeper thereof, together with this precept. And I do hereby command you, the said keeper of the said common gaol, to receive the said Francis Martin into your custody in the said common gaol, and there safely keep him until he shall be thence delivered by due course of law. Given under my hand and seal this 6th day of February, in the year of our Lord, 1864, at Clifton, in the said County of Welland aforesaid.

(Signed) JOHN BURNS, Mayor.

Mr. Harrison, upon obtaining leave to file the writ, and return, applied to have prisoner discharged from custody, upon the grounds—

1. That the Imperial Statute 9 Geo. II., c. 30, commonly called the Foreign Enlistment Act, was confined in its operation to Great Britain and Ireland.

2. That if ever in force in Canada, it has since been repealed by the Imperial Act of 59 Geo. III., c. 69, which is not in force in Canada.

3. That whether in force or not, the warrant under which defendant was in custody, was illegal, because it charged no offence with certainty, because the persons alleged to have been enlisted were not shewn to be subjects of Her Majesty, and because, for all that appeared, the prisoner had a license from Her Majesty to enlist persons to serve a foreign power.

JOHN WILSON, J.—I think the prisoner must be discharged. It appears to me, without determining the ques-

tions raised as to the Foreign Enlistment Act being or not being in force in Canada, that the warrant is defective for one or more of the reasons assigned against it. I may add that on this matter I do not rely upon my own judgment alone, but am supported by the opinion of the Chief Justice of the Common Pleas. The prisoner will therefore be discharged.

Order accordingly.

IN RE WILLIAM ROSS.

Habeas corpus—Sufficiency of materials—Effect of defective materials—Sufficiency of commitment in default of sureties to keep the peace—Power of Judge in Chambers.

Held, 1st. That the affidavit upon which an order for a writ of habeas corpus is moved should be entitled in one or other of the Superior Courts.

Held, 2nd. That as a general rule the affidavit should be made by the prisoner himself, or some reason, such as coercion, &c., shown for his not making it.

Held, 3rd. That it is discretionary with the Judge to whom the application is made to receive an affidavit of a different kind.

Held, 4th. That it is sufficient to return to a writ of habeas corpus a copy of the warrant under which the prisoner is detained, and not the original.

Held, 5th. That a commitment in default of sureties to keep the peace should show the date upon which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear.

Quære. Can a Judge in Chambers rescind his order of a habeas corpus, or quash the writ itself on the ground that it issued improvidently.

Quære, also. Has a Judge in Chambers power, by summons, to call upon prosecutor or magistrate to shew cause why a writ of habeas corpus should not issue instead of at once ordering the issue of the writ.

[CHAMBERS, March 3, 1864.]

M. C. Cameron, Q.C., on the 29th of February last, had made application to Mr. Justice John Wilson, sitting in Chambers, for an order for a writ of habeas corpus, directed to the gaoler of the county of Waterloo, to bring up the body of William Ross, detained in an illegal custody as it was alleged.

The application was made upon an affidavit (not entitled in any Court) of the gaoler of the county of Waterloo, to the effect that on the 25th of February, William Ross was delivered into his custody by Thomas Armstrong, a con-

stable, under and by virtue of a warrant of which he annexed a copy, and that William Ross was not detained in his custody under any process, civil or criminal.

The order was made, and on the same day a writ of habeas corpus was issued from the Court of Queen's Bench, directed to the gaoler at Berlin, commanding him forthwith to bring up the body of William Ross.

Robert A. Harrison, on the 1st of March, upon reading the affidavit upon which the order was made, and the order itself, obtained from Mr. Justice Adam Wilson a summons returnable the next day before Mr. Justice John Wilson, calling upon William Ross, his attorney or agent, to shew cause why the order of Mr. Justice John Wilson should not be set aside, and all proceedings subsequent thereto, including the issue of the writ of habeas corpus, upon the grounds:

1st. That said order was made without any affidavit in title or styled in this Court being first filed on the application for said order.

2nd. That said order was made without an affidavit of said William Ross first being filed, or it being first shewn that he was coerced and unable to make an affidavit.

On the 2nd of March the gaoler returned that he had the body as he was commanded, and that the cause of his detention was a warrant, of which he annexed a copy to the writ. The warrant was in this form:

PROVINCE OF CANADA, } To the constable of Berlin and
County of Waterloo, } to the keeper of the common gaol
to wit: } of the said county at Berlin in the
said county of Waterloo: Whereas on the twenty-fifth day of February, instant, complaint on oath was made before the undersigned, one of Her Majesty's Justices of the Peace in and for the county of Waterloo, by James Glennie, of the township of Woolwich, said county and Province, that William Ross, of the same place, in the county aforesaid did [omitting date] threaten to take revenge on said James Glennie, that he had an instrument, shewing a revolver, and would use it in some convenient place [omitting statement of

fear of bodily injury]. And whereas the said William Ross was this day brought and appeared before me the said Justice to answer unto the said complaint, and having been required by me to enter into his own recognizance in the sum of £200, with two sufficient sureties in the sum of £100 each, as well for his appearance at the next general quarter sessions of the peace to be held in and for the said county of Waterloo, to do what shall be then and there enjoined him by the Court, as also in the meantime to keep the peace and be of good behaviour towards Her Majesty and all her liege people and especially towards the same James Glennie, and the said William Ross hath refused and neglected and refuses and neglects to find such sureties. These are therefore to command you, the said constable of the town of Berlin, to take the said William Ross and him safely convey him to the common gaol at Berlin aforesaid, and there to deliver him to the keeper therefore together with this precept: and I do hereby command you, the keeper of the said common gaol, to receive the said William Ross into your custody in the said gaol, there to imprison him until the said general quarter sessions of the peace, unless he in the meantime find sufficient sureties as well for his appearance at the said sessions as in the meantime to keep the peace as aforesaid.

Given under my hand and seal this twenty-fifth day of February, in the year of our Lord, 1864, at the village of Conestogo, in the county aforesaid.

(Signed) WILLIAM HENDRY, J. P. [L.S.]

Cameron, Q. C., thereupon asked leave to file the writ and return, and having done so moved for the discharge of the prisoner upon the grounds:

1st. That the warrant did not contain the day on which the alleged threatening words were used, and for all that appears they were too remote to cause a present apprehension at the time the information was laid.

2nd. That the warrant omitted all mention of fear or apprehension on the part of James Glennie, at the time the information was laid.

It was then agreed that the summons to set aside the habeas corpus, and the prisoner's right to his discharge under the habeas corpus, should be argued together.

Harrison, *contra*. The writ was issued improvidently and should be quashed, or the order for it rescinded, upon the grounds:

1st. That the affidavit, not being intituled in any Court, was not such an affidavit as perjury could be assigned upon, and therefore was no affidavit, citing *In re Eccles* (6 U. C. L. J. 59; *Con. Stat. U. C. ch. 24, sec. 6*); *Palmer v. Rodgers* (6 U. C. L. J. 188).

2nd. That the affidavit, even if properly intituled, not being made by the prisoner himself, and it not being shown that he was coerced or unable to make an affidavit, was insufficient, citing the case of *The Canadian Prisoners* (5 M. & W. 32).

He also objected to the return as insufficient because a copy only, and not the original was returned, and for all that appeared the original was without a seal.

He argued against the prisoner's discharge:

1st. That the date was immaterial; that the Court could not and would not presume a remote date, but rather that the date was so recent as to justify the magistrate in what he had done, and cited *The King v. Tregarthen* (5 B. & Ad. 678; *The Queen v. Dunn* (11 Ad. & El. 599).

2nd. That it was enough for the warrant to show words calculated to produce a breach of the peace, without in so many words showing actual apprehension of bodily injury; that the object of the proceeding was to prevent the commission of a crime involving an assault; that the words used indicated an intention to commit a crime of that nature, and that the effect of the commitment was to prevent that intention being carried into effect, citing *Haylock v. Sparke* (1 El. & B. 471, 478, 482, 486, 487); *Burns' Justice*, tit. "Surety to keep the Peace."

M. C. Cameron, Q.C., in reply, argued that the order for the writ might be made without any affidavit; that the affidavit used, though not entitled in any Court, was a sufficient affidavit; that it was in the discretion of the Judge to have required an affidavit made by the prisoner himself; that hav-

ing dispensed with it, it was too late after issue of the writ to raise the objection; that the return was sufficient, though not having the original warrant annexed; that the uttering of the words involving the threat, and not the warrant, was "the cause of the detention;" that the warrant was rather "the means" and not for the "cause" of the detention; that the warrant was defective for the two reasons assigned, as might be seen by reference to *Con. Stat. Can.* p. 1131, 1132; that a blank is there left for the date of the speaking of the words, and that as to the fear it is there stated, "and that from the above and other threats used by the said A. B. towards the said C. D., he the said C. D. is afraid that the said A. B. will do him some bodily injury, and therefore pray, &c." He cited Elden's case (2 M. & S. 226); Nash's case (4 B. & Ald. 295), Souden's case (4 B. & Ald. 294).

The learned Judge having heard the argument, remanded the prisoner to the custody of the gaoler of the county of Waterloo, to be by him delivered to the gaoler of the United Counties of York and Peel for safe custody till next morning, then to be produced before him in Chambers to hear judgment.

JOHN WILSON, J.—I think the objection to the affidavit, that it is not intitled in any Court, a good objection. Had my attention been drawn to that fact at the time application was made to me for the writ, I most certainly should not have made the order. As a general rule also the affidavit should be made by the prisoner himself, or reason shewn why he does not and cannot make an affidavit. Still I apprehend it is in the discretion of the Judge to receive an affidavit of a different kind. Whether I should have done so or not, at the time the application was before me, had my attention been directed to the fact that there was no affidavit made by the prisoner, I need not say.

I think the writ issued improvidently; but I am not sure that I can now quash it, or rescind my order upon which it issued. Even if it were clear to me that I have the power, I no not know that I would exercise it now that the writ has

been returned and filed, and the prisoner is here awaiting my judgment.

In England I find it is often the practice, instead of allowing the writ to issue in the first instance, to grant a rule nisi only. Had that been done here the writ would not have been issued upon the defective materials. Whether a Judge in Chambers can grant a summons only for the writ is a question. I have not found the report of any case in England where a Judge in Chambers has done so. I intend to bring this matter before my brother Judges in order that some settled practice may be agreed upon in regard to the issue of writs of habeas corpus in Upper Canada.

In the meantime I must order the discharge of this prisoner. I think the warrant bad upon both grounds of objection against it. In my opinion it should have contained the date on which the words were alleged to have been spoken, and also a statement to the effect that complainant was apprehensive of bodily injury. Both seem to be required by the forms of information and warrant given in Con. Stat. Can. p. 1133, and neither ought, I think, to be dispensed with. Let the prisoner be discharged.

Order accordingly.

ANDERSON V. CULVER, ET AL.

Term's notice—Necessity for, when plaintiff's proceedings stayed till security for costs be given—Laches.

A plaintiff residing out of the jurisdiction of the Court, in 1862, commenced an action of ejectment for the recovery of lands situate within the jurisdiction of the Court. Issue was joined before October, 1862. On 23rd of that month, defendant obtained and served an order, staying plaintiff's proceedings till he should furnish security for costs. Plaintiff's proceeding was accordingly stayed till 20th of February, 1864, when plaintiff having filed a bond for security for costs, had same allowed, and on 24th of same month served notice of the allowance of the bond together with notice of trial, without having previously given a term's notice of his intention to proceed.

Held, that the notice of trial was irregular.

Held also, that an application on the part of an attorney resident in the country made on the 1st of March, to set aside a notice of trial served on the 24th of February, on his Toronto agent as irregular, being made within eight days after such service, is not too late.

[CHAMBERS, March 5, 1864.]

This was an action of ejectment in which issue had been

joined before October, 1862. On the 23rd day of that month, an order had been obtained by the defendants for a stay of proceedings till security for costs should be given.

On the 17th February, 1864, the plaintiff filed a bond for such security, no proceedings in the meantime having been taken since the 4th of November, 1862, and no term's notice given.

On the 20th February last, the Master allowed the bond, and on the 24th notice thereof and notice of trial were served on the defendants' attorney.

Robert A. Harrison, on 1st of March, made application to Adam Wilson, J., for a summons calling upon the plaintiff to shew cause why the filing of the bond for security for costs, the notice that it had been filed, the service thereof, the allowance thereof, and the notice of trial served on the 24th February last, the service thereof and all proceedings subsequent thereto, or such or one of them as to the presiding Judge in Chambers might seem meet, should not be set aside with costs, upon the ground of irregularity in this, that issue, having been joined more than four terms, no term's notice of intention to proceed had been given before the taking of said proceedings, or some or one of them.

Mr. Justice Adam Wilson, in the absence of direct authority in support of the summons, refused it. He, however, gave permission to renew the application.

Accordingly on 2nd March, the application was renewed before John Wilson, J., and upon the authority of 1 Chit. Archd. 9 Edn. p. 145, a summons was granted.

C. S. Patterson, for the plaintiff, shewed cause. He contended that since the defendants had got the proceedings stayed, he could not pretend that he was injured by the delay, and that if a term's notice were necessary, the defendants had waived it by not applying to set the proceedings aside within four days after the service of notice for allowance of bond.

For his first contention he admitted that he had no express authority. For his second he cited *Willis v. Ball* (1 Dowl. N. S. 303), which was a motion to set aside a notice

of declaration served on the 30th October, and the application made on the 4th November following, was held to be too late, although the 31st October was a Sunday.

Robert A. Harrison, in support of the summons, cited *Tyre v. Wilkes* (2 P. R. 265); *The Bishop of Toronto v. Cantwell* (11 C. P. 371), *Archbold's Practice*, 9 Edn., vol. 1, p. 145; *Unite v. Humphrey et al.* 3 Dowl. P. C. 532). The reason of requiring to a term's notice, was to prevent surprise; the not putting in the bond, without which he could not proceed, was the plaintiff's own neglect; he voluntarily allowed four terms to elapse, and should be bound to give a term's notice.

JOHN WILSON, J.—I think the summons as to setting aside the notice of trial, must be made absolute. If the plaintiff was out of the jurisdiction of the Court, the defendants had a right to security for costs. To compel this, the Court does nothing more than stay proceedings till security be given. If time runs on, it is caused by the plaintiff's laches, and is not the defendants' act. The giving of security is not technically a proceeding in the cause. It is a something to be done to authorize the plaintiff to proceed, without which he cannot take a step. Here he puts in security, and was in a position to go on according to the practice of the Court. But this practice required that if no proceedings had been taken within four terms, the plaintiff was bound to give the defendants a term's notice. In the case of *Minchiner v. Martin* (12 C. B. 455), *Creswell, J.*, says, "In analogy to that case (*Doe Vernon v. Roe*, 7 Ad. & E. 14) the plaintiff here might have given security for costs at any time without giving a term's notice, and might also apply to rescind the order for security, though he could not take any other steps." In this view of the present case, aided by this authority, I hold the giving of the notice of trial the first step in the cause taken since the proceedings were stayed; but for the reasons already stated, plaintiff could not take it without giving the defendants a term's notice of his intention to do so, which he has not done.

As to the point whether this application has been made in time, I have some doubts. This is a cause from the country. The notice of trial was served on the town agent, who had to communicate with his principal. The motion was made within eight days, which I think reasonable, and the defendants have not waived their right to move.

The summons will be made absolute so far only as setting aside the notice of trial; and since the point is new, the costs will be costs in the cause.

Summons absolute. Costs to be costs in the cause.

FOGO V. PYPHER ET AL.

Ejectment—Security for costs—Necessity for prompt application.

In an action of ejectment commenced on 26th February, 1861, appearance entered on 18th March following, and defendant, on the 19th of same month demanded security for costs on the ground that the plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial, it was held that an application made by defendant for security for costs, after service of the notice of trial, was too late.

[CHAMBERS, March 7, 1864.]

This was an action of ejectment commenced on the 26th February, 1861. Appearance was entered on the 18th March following. On the 19th March security was demanded on the ground that the plaintiff then resided in Great Britain, and has never since resided within the jurisdiction of this Court. On the 21st March, 1861, notice was served limiting the defences of the several defendants.

No proceedings were taken from that time till the 28th January, 1864, when the plaintiff gave the defendant notice of his intention to proceed after the end of the then next ensuing term, by giving notice of trial. The defendant took no notice of this. The plaintiff, thereupon, on the 20th February, 1864, gave notice of trial for the next assizes, to be held at Whitby.

McLennan, on the 24th day of February, took out a sum-

mons calling on the plaintiff to shew cause why he should give the defendants security for costs.

Kerr shewed cause, and contended that the defendant was too late in his application.

Thereupon an affidavit was filed by defendant's attorney stating that his belief was and is that it was understood between the attorney for the plaintiff and himself that they would not proceed until they gave security for costs; that, acting on this belief, he did not make the application or think of doing so till after the notice of trial had been given on the 20th of February.

The plaintiff's attorney and all those connected with his office having anything to do in the management of the cause, denied that there was any such understanding or any allusion to it, at any time, or any promise or understanding that they were to give security for costs.

The cases cited are referred to in the judgment.

JOHN WILSON, J.—It is much to be regretted that gentlemen of the profession do not reduce to writing any arrangement which may be made in a cause by which the ordinary course of proceedings is not to be followed. The result of the want of this precaution in this case is that one gentleman states on oath what a number of others deny, and the Court has no alternative but to treat the matter as if no arrangement whatever had been made.

In ordinary cases application for security for costs must be made before plea pleaded or issue joined. If the defendant knows that the plaintiff is out of jurisdiction (*Wilson v. Minchin*, 1 Dowl. P. C. 299); and if made afterwards it must be made promptly after defendant becomes aware of the fact that plaintiff is out of the jurisdiction of the Court (*Wood v. Bellisle*, 1 Cham. Rep. 130).

In an action of ejectment issue is joined, in fact, when the defendant appears and makes his defence; still I apprehend defendant may apply for security for costs provided he apply punctually. I cannot learn that any rule of practice as to time has been established here.*

* See *Crowe et al. v. McGuire*, 3 U. C. L. J. 205.

In *Duncan v. Stint*, (5 B. & Ald. 702), it is laid down that when a cause is pending, a party, if he means to apply for security for costs, must take no steps after he knows the party is out of the jurisdiction.

In *Brown v. Wright* (1 Dowl. P. C. 95), it is said that where a defendant pleads, after it has come to his knowledge that the plaintiff is abroad, the Court will not oblige the defendant to give security for costs.

In *Fry v. Wills* (3 Dowl. P. C. 6), the writ was issued in June. The plaintiff declared in October. The defendant took out a summons for time to plead and then obtained a rule for security of costs. The Court said the rule of H. T. 2 Wm. IV. gave the Court discretion, and held the defendant entitled to security for costs.

In *Young v. Rishworth* (8 Ad. & E. 479), (note), the plaintiff in October, 1836, became insolvent, and in December got his discharge. Defendants' motion for security for costs, in Michaelmas Term, 1837, was held too late.

Gell v. Curzon (4 Ex. 813), was an application for security for costs, not because plaintiff was abroad, but because he was insolvent, and the suit was not being carried on for his benefit.

In *Torence v. Gross* (2 Prac. Rep. 55), it was held that if defendant take steps after becoming aware of plaintiff's residence out of the jurisdiction, he waives his right to ask for security.

In *Morgan v. Hellems* (1 Prac. Rep. 363), a defendant was held too late in moving on 23rd January, on an affidavit sworn on 4th January.

In *Mainwright v. Bland* (2 C. M. & R. 740), Parke, B., intimated that security for costs must be moved for as early as possible, and before issue joined; but if moved after, the Court must be satisfied that the defendant did not know, before that step in the cause was taken, the circumstances on which he grounds his application.

Here I think the defendant was doubly precluded; first in not moving within a reasonable time after his demand in 1861; and secondly, in not moving within the term that next

followed the plaintiff's notice of the intention to proceed after the term.

The summons must be discharged.

Summons discharged.

PHILLIPS ET AL. V. WINTERS.

Ejectment—Notice Limiting Defence—Issue—Practice.

Where a defendant limits his defence under Con. Stat. U. C., cap. 27, sec. 12, to part of the lands sought to be recovered, he is entitled to the four days allowed him by the statute, even though this may have the effect of throwing the plaintiff over an assize; and an order will not be granted to plaintiff to amend the issue served by him before the four days have elapsed, without prejudice to his notice of trial.

[CHAMBERS, March 24, 1864.]

The writ in this case was served on the 3rd of March, 1864. On Saturday, the 19th of March, the defendant appeared. The 21st was the last day for notice of trial for the Cobourg Assizes, and on that day the plaintiff made up and served the issue under sec. 16 (form No. 4), and gave notice of trial. On the 22nd the defendant served notice, limiting his defence to part of the lands claimed.

O'Brien, on the 24th March, asked for a summons for leave to amend the issue served, without prejudice to the notice of trial, by inserting the limitation of the defence to part, or by substituting an issue in form No. 3 under the provisions of sec. 16. He referred to Cole on Ejectment (p. 134), and Grimshawe v. White et al. (12 C. P. 521).

DRAPER, C.J.—I have already considered this point. The defendant is entitled by statute to his four days for limiting his defence, and to eight days for notice of trial, and I cannot take away his right, even though the effect may be to throw the plaintiff over the assizes. There is no authority cited in support of the proposition laid down in Cole, and I have found none.

Summons refused.*

* See Buchanan v. Bettes et al., 2 U. C. L. J. N. S. 71.

ROBSON V. ARBUTHNOTT.

Service by mail—Computation of time.

Where it was agreed between the attorneys of the parties to a cause (the one resident in Whitby and the other in Collingwood), that papers should be served by mail, it was *held*, that the time of the service of notice of trial commenced to count from the time it was mailed by plaintiff's attorney, and not from the time of its receipt by the defendant's attorney. *Semble*,—Where such a mode of service is agreed upon, the paper mailed, in the event of loss or miscarriage, is entirely at the risk of the attorney to whom sent.

[P. C. E. T. 27 Vic.]

Sampson, for the defendant, during last Easter Term, obtained a rule nisi, calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside on the ground of irregularity, the plaintiff having proceeded to trial on a notice served too late for the assizes.

The notice of trial was served, as alleged by the defendant says, on the 17th March, for the assizes to be holden on the 23rd of the same month, accompanied by a letter from the plaintiff's attorney, dated 15th of March.

O'Brien shewed cause. He filed the affidavit of Mr. Billings, the plaintiff's attorney, wherein it was stated that on the 19th of September, 1863, he wrote to the defendant's attorney, sending him particulars of the plaintiff's claim, and concluding as follows: "I will file any papers for you and send declaration by post, if you like." And that a few days he afterwards received an answer from the defendant's attorney, desiring the plaintiff's attorney to send declaration by post. Mr. Billings further stated that from letters received by him from the defendant's attorney, he always understood he (defendant's attorney) would accept service of papers by mail in this cause, and upon such understanding he (plaintiff's attorney) acted; and that he served the notice of trial by mailing it on the 15th, in consequence of the understanding he had with the defendant's attorney.

Mr. O'Brien contended that the service was in effect made when the letter was posted, and cited Warren v. Thompson (2 Dowl. N. S. 224).

Sampson supported the rule, and referred to *Allen v. Boice* (10 W. C. L. J. 70); *Francis v. Breach* (9 U. C. L. J. 266); *Cuthbert v. Street* (6 U. C. L. J. 20); *Bremer v. Bacon* (Rob. & Har. Dig. 327); *Consumers' Gas Co. v. Kissock* (5 U. C. R. 542); *Grand River Navigation Co. v. Wilkes* (Har. & O'B. Dig. 554); *Lyman v. Snarr* (9 U. C. C. P. 64).

ADAM WILSON, J.—I have examined the different cases referred to, but none of them are directly to the point. The facts here are not disputed; there is no doubt that the defendant's attorney did desire service of papers in this cause to be made by mail. But the question is, whether the time should be reckoned from the time of their being mailed by the plaintiff's attorney, or from the time of their being received by the defendant's attorney—whether the time of the transit is to be deducted from the plaintiff or defendant, and at whose risk the transmission is to be.

When an attorney has desired papers to be left for him at a particular place, service at that place is sufficient, and of course counts from the time when left at that place.

In this case, if any paper, after having been mailed, had been lost, or had never reached its destination, I incline to think that it would have to be at the risk of the defendant's attorney; that the plaintiff's attorney would have done all that he had engaged to do; and that, notwithstanding its loss or miscarriage, it would be a good service on the defendant's attorney.

If not then, when would it be a good service? How could the plaintiff's attorney know whether the defendant's attorney received the paper, or whether he ever received it? By taking the time of the deposit in the post office as the time from which to reckon the service as having been made, he knows the time precisely; and by the defendant accepting this mode of service, he has, I think, accepted as a part of it the time of its deposit as the time of its service.

Notice of dishonor of a bill or note is duly given by sending a letter by post at and from the time the letter is posted.

So where parties carry on a contract by communication through the post, the contract is completed upon the posting of the letter of acceptance, although the letter never reach its destination. (See *Duncan v. Topham*, 8 C. B. 225), and the cases there cited.

The defendant's attorney was not obliged to accept of this manner of service; but having agreed to it, the mode and the time of the service must go together, and be at his risk, as the plaintiff's attorney could have done no more than he did do under such an agreement.

The defendant has sworn to merits, and probably his attorney was misled as to the effect of the arrangement he had made with the plaintiff's attorney for service of papers. I shall therefore discharge the rule as to irregularity with costs, and give leave to the defendant to move for a new trial on the merits next term, unless the plaintiff consents to the defendant getting a new trial on payment of costs at once.

Rule discharged accordingly.

REYNOLDS V. STREETER.

Setting aside fi. fa. lands—Spent writ—Feigned issue.

A *fi. fa.* lands had been renewed on the 25th of August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by plaintiff's attorney to the Sheriff, and the latter on the same day sent the usual advertisement thereof to the *Canada Gazette* and a local paper. On the 2nd September following, it appeared in a local paper, and in the *Gazette* on a subsequent day.

Held, that the writ was spent, and that the lands could not be legally sold under it. Owing to the difficulty of deciding whether the judgment had been paid or not, the learned Judge decided that the parties should proceed to the trial of a feigned issue on that ground.

[CHAMBERS, February, 1864.]

Foster obtained a summons calling on the plaintiff to shew cause why the *fi. fa.* lands in the hands of the Sheriff of the County of Hastings, and all proceedings thereunder, should

not be set aside, and further proceedings in the judgment stayed on the grounds that no action had been taken on the writ until after it had expired, and that the judgment was paid before the issuing of the writ.

Many affidavits were filed on each side, bearing chiefly on the question of payment or non-payment of the judgment, and the decision of the learned Judge turned chiefly on the question whether or not the writ had expired.

The facts on that point were undisputed. The writ was renewed on the 25th of August, 1862. Nothing had been done under it till the last day of its currency, 24th August, 1863. On that day a list of defendant's lands was given by plaintiff's attorney to the Sheriff. The latter on same day sent the usual advertisement to a local newspaper and the Canada Gazette. On the 2nd September, 1863, it appeared in the local newspaper, and not until a subsequent day in the Canada Gazette.

M. B. Jackson shewed cause, citing *Doe Tiffany v. Miller*, (6 U. C. R. 426); *Ib.* (10 U. C. R. 65).

Walbridge, Q.C., supported the summons.

HAGARTY, J.—The first question is, whether the lands can legally be sold on this *fi. fa.*, or whether it is a spent writ.

Unless bound by some decisions to the contrary, I should have no hesitation whatever in deciding that in my judgment it is clearly a spent writ. I cannot understand upon what principle it can be held that the act of a Sheriff in drawing up an advertisement on the last day of the currency of the writ, and sending it for publication on a day necessarily long after that day, can be such an inception of execution as to give force and vitality to all subsequent proceedings.

The C. L. P. Act, sec. 268, enacts "that the advertisement in the official Gazette of any lands for sale under a writ of execution during the currency of the writ (giving some reasonably definite description of the land in such advertisement), shall be deemed a sufficient commencement of the execution to enable the same to be completed by a

sale and conveyance of the land after the writ has become returnable;" and the next clause provides for the case of the Sheriff going out of office during the currency of the writ before the sale, and directs the new Sheriff to execute, sell and convey, but allowing the outgoing Sheriff to execute any conveyance of land sold by him while in office.

I certainly understand that these sections were intended to reduce to reasonable certainty the very unpleasantly vague state in which the law previously stood. Section 268 gives an intelligible definition of what shall be a legal inception of an execution against lands. It is pressed upon me by counsel that the act leaves the law as enunciated in *Doe Tiffany v. Miller* untouched. In the absence of any express decision to that effect, I am unwilling to believe that the section in question is so apparently useless.

But even without the intervention of the C. L. P. Act, I do not think that enough was done in this case to bring it within the decision of *Doe Tiffany v. Miller*, and I do not understand that case as going the length required by the present plaintiff.

Sir J. B. Robinson says (6 U. C. R. 437): "We have here the Sheriff going with a writ (as may be fairly presumed), which commanded him to sell Miller's lands, entering on lands which he saw him in possession of, and which he knew he owned, and which it was therefore, as we may suppose, in his mind to seize and sell as being subject to the writ. When we consider that he went to Miller for that purpose, which in the nature of things he must have declared, and took from him a list of his lands, both in the town and out of it, omitting only those which he saw him actually seized and possessed of, and which he knew the extent of, &c., I think we should, in support of the execution which the law favours, and in protection of the purchaser, look upon him as declaring to defendant, 'I come under the authority of these writs, which I hold, to seize your lands, both those on which I see you living, and of which I have knowledge, and any others which you may possess in this district, of which I have no knowledge,

which lands I shall proceed in due course to sell under these writs.' That is, I think, the plain construction and effect of Mr. Jarvis's conduct, according to his evidence, and it is as formal an act of seizure as we have reason to suppose takes place in all or any of such cases."

Macaulay, J.: "Upon the best consideration, I think that if a Sheriff, before leaving office, and before the return day, takes proceedings under a *fi. fa.* lands, which constitutes an overt act towards execution, and equivalent to seizure of goods sufficient as between the creditors and debtors, as by entry, with the declared purpose of seizing, taking possession of the title deeds, or adopting some other symbol, as laying hold of the knocker of the door, the limb of a tree, &c., acts usual in giving livery of seizin in feoffments, which I consider would be a laying on of the executions that he may proceed to advertise and sell afterwards, though out of office, and after the return day."

. . . . If he entered, not meditating any proceeding against those lands, but merely enquiring of the defendant what land he had, and took a note of these as returned by him, it would not be a seizure; but if he entered knowing the lands to be the defendant's, and with intent thereby to commence the execution; if he entered on these lands as defendant's, and also so entered in order to inquire of other lands, it would be evidence of a seizure. . . . I think the evidence warranted the inference that the ex-sheriff did by actual entry seize and levy on these lands with defendant's knowledge while in office, and long before the return day, and that such incipient proceeding was duly kept alive until the sale."

Draper, J., dissented from these judgments. "I understand these two very learned Judges to have arrived at their conclusion on the special facts of the case, and that the acts of Mr. Sheriff Jarvis were evidence of a seizure of the lands and a laying on of the executions."

Their language, quoted above, seems clear as to that view. I am far from thinking that they would have held it sufficient for the Sheriff to have sat down in his office the day before

the writ expired, copy out a list of lands he heard defendant owned, and send it to the Gazette and another paper to be advertised long after the writ was spent. I have wholly misconceived their expressed views if they support plaintiff's contention.

In another ejectment between same parties, in 10 U. C. R. 85, the same point is again noticed. The court adheres to its former view. Mr. Justice Burns, who had in the interval joined the Court, gave a judgment agreeing with that formerly delivered. Some of his expressions are quoted by plaintiff as in his favour, e.g.: "I do not see that the Sheriff could well have done anything more towards a beginning of the execution, short of making an actual and formal entry upon the lands, and that I think he was not bound to do. It seems that he followed up his first act by publishing an advertisement of the sale before the expiration of the writ, though of course that was done after he ceased to hold office, I think the publication of the advertisement would, without any other act done by him, have been an inception of the writ, and it appears to me there may be other modes of beginning an execution against lands besides the publication of the advertisement. and otherwise than by an actual and formal entry upon the land."

I repeat that, in my judgment, even before the C. L. P. Act, there was no legal inception or laying on of this writ against lands during its currency sufficient to support any subsequent advertising or sale thereunder.

I further think that the C. L. P. Act clearly defines what shall be an inception, and that in either view the plaintiff fails, and that the summons must be made absolute to set aside the writ, or rather, I suppose, all proceedings thereunder.

I feel the utmost difficulty in deciding (if necessary so to do), whether the plaintiff's judgment has been paid or not. Having given it the best consideration in my power, I think it a case in which the opinion of a jury should be taken, if possible, and following the course adopted in cases where a judgment is attached as fraudulent, I should direct that the

parties should proceed to the trial of a feigned issue; that defendant, Streeter, should be plaintiff, and the now plaintiff, Reynolds, the defendant; and that the question to be tried shall be, whether the judgment recovered was paid or not before the issuing of the fi. fa. against lands, and that the trial take place at the next fall assizes for the county of——. All questions as to costs reserved.

If I had the power I should direct that plaintiff and defendant be admissible as witnesses.

Order accordingly.

GRIMSHAW V. WHITE ET. AL.

Writ of summons in ejectment—Issued in blank—How taken advantage of—Præcipe—Second action stayed while former pending—Practice.

The practice of issuing writs of summons in blank by officers of the Court is not to be sanctioned or approved.

Where a ground of objection to a writ of summons is that it was issued in blank, the facts connected with its issue must be clearly laid before the Court, for nothing will be intended in favour of such an objection.

The fact that a writ of summons in ejectment in some respects varies from the præcipe on which it issued, is no ground for setting aside the writ, for the præcipe is no step or proceeding in the cause.

Where an action of ejectment was brought by plaintiff against three defendants, whereon a verdict was rendered for plaintiff, and plaintiff afterwards, without discontinuing his action, commenced a second action of ejectment against two of the defendants for the recovery of the same premises, an order was made that unless plaintiff elected to discontinue one or other of the two suits, and gave the costs of the suit discontinued, the proceedings in the second action should be stayed.

[CHAMBERS, March 18, 1864.]

Defendants obtained a summons calling on plaintiff to shew cause why the writ of summons herein and the service and copies thereof upon the said defendants should not be set aside with costs for irregularity in following the particulars:—

1. That the said writ was not duly issued by the Deputy Clerk of the Crown and Pleas for the United Counties of Northumberland and Durham, by whom it purports to have been issued.

2. That no præcipe or sufficient præcipe for the said writ was filed with the said Deputy Clerk before the same was issued.

3. That the said writ was altered without authority (after the same was issued), by the plaintiff or his attorney.

4. That no sufficient venue is stated in the margin of the said writ, the venue being laid in the United Counties of Northumberland and Durham, instead of the proper county of the said united counties.

Or why all proceedings in the action should not be stayed on the ground that at the time of the commencement thereof another action for the same cause was and still is pending against the defendant at the suit of the plaintiff.

Or why all proceedings herein should not be stayed on the ground that the costs of a former action for the recovery of the same lands and premises brought by the plaintiff against the defendants have not been paid.

The affidavits on which the summons was issued shewed that some officer in the office of the Deputy Clerk of the Crown told the defendant's attorney that he, the officer, issued the writ in this cause without filling it up himself, and had given a blank writ to a clerk from the office of the plaintiff's attorney upon a præcipe in the following form:

IN THE QUEEN'S BENCH.

Thomas Grimshawe v. Josiah Chas. White and Catherine White, of the Town of Cobourg, in the County of Northumberland, defendants.	}	Required a writ of summons in ejectment in the above cause.
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JAMES COCKBURN,

Dated 27th Feby., 1864.

Plaintiff's attorney.

It was also shewn that an action of ejectment was brought in October, 1862, by the above-named plaintiff against defendants and one Zaccheus White to recover possession of the same land as described in the writ of summons in this cause, plaintiff in that action claiming title in like manner as in this action; that in that action a verdict for plaintiff was obtained at the last fall assizes for the United Counties of

Northumberland and Durham; that a rule for setting aside the same was granted, which rule was still pending at the time of the commencement of this action.

Osler for the plaintiff.

Moss for the defendant.

Cole on Eject. 80; Cotton v. McCulley (7 U. C. L. J. 272), were cited.

Draper, C.J.—In what I am about to say, I do not wish to be understood as giving sanction or approval to any of the officers of the Court letting writs of summons go out of their hands in an incomplete form.

The first objection, that the writ was not “duly issued,” might be a very solid objection if maintained. It depends for validity on what follows. First, that the writ varies from the præcipe. This, if true, is not I think any ground for setting the writ aside. The præcipe is no step or proceeding in the cause. Second, that the writ was altered after it was issued. This means that some officer in the office of the Deputy Clerk of the Crown told the defendants’ attorney that he had not filled up the original himself, but had given to the clerk of the plaintiff’s attorney a blank writ upon the præcipe. Until addressed to some one, and until the land to recover possession whereof it was desired to bring ejectment was inserted, it was in truth no writ. By whom or where it was filled up is not shewn. For all that appears, it was done in the office of the Deputy Clerk of the Crown, and under his supervision. I shall not intend anything in support of this objection.

The remaining objections were given up.

As to irregularity, therefore, the objection fails.

As to staying proceedings because there is another action pending.

There were three defendants in the former action; there are only two of them made defendants in this action. But the notice of title by which the plaintiff claims appears to be the same in both. That another suit is pending for the

same cause of action is ground for a plea of abatement in other actions, but in ejectment there are no pleadings, and in that shape the defendant cannot raise the question. The plaintiff offers no denial to the facts asserted in the affidavits on which this summons was granted, and I think I must take it to be admitted, therefore, that this action is brought to recover the same premises and on the same title as a former action brought and still pending against these two defendants and a third person. Whether he appeared to defend the former action is not shewn. I do not see why it was deemed necessary to bring a second action, and on this assumption of facts it seems a vexatious proceeding.

I have not met with any case since the new Ejectment Act which decides the question raised, but by analogy to the proceedings in the old action I think the plaintiff should not be allowed to proceed in this cause until he pays the costs of the former action, if he determined to abandon it.

If he determine to proceed with it, then the proceedings in this case should be stayed, as it is unnecessary and vexatious. It is in the power of the plaintiff to discontinue either action, and it appears to me he should be compelled to take this course in one cause or the other.

I think, therefore, an order should go that unless the plaintiff elect to discontinue one or other of the two suits, and to pay the costs of the action so discontinued, the proceedings in the present action should be stayed.

Order accordingly.

WARD, Judgment Creditor; VANCE, Judgment Debtor;
THOMPSON, Garnishee.

*Attaching order—Order to pay—Suggestion of death of garnishee—
Execution.*

There is no power in the Court or Judge to order or permit a suggestion to be entered of the death of a garnishee so as to legalize execution against his executors or administrators.

[CHAMBERS, March 27, 1864.]

The judgment creditor obtained a summons calling upon Thomas Brunskill and Andrew Stoddart, the executors of the last will and testament of David Thompson, deceased, the garnishee in this cause, to shew cause why George Ward should not be at liberty to enter a suggestion on the order made in this cause on the twenty-fourth day of June, A.D. 1863, for the garnishee to pay the judgment creditor the debt due from him to the judgment debtor; or so much thereof as would satisfy the judgment debt, to the effect that it manifestly appears to the Court that the said George Ward is entitled to have execution thereupon; or why the said George Ward should not have execution against the said Thomas Brunskill and Andrew Stoddart, as such executors, in any other manner that the presiding Judge should think fit.

The affidavit on which the summons was granted shewed that on the 2nd of August, 1862, the judgment creditor recovered a judgment against the judgment debtor for the sum of \$1,007; that the judgment was still unsatisfied; that the judgment creditor attached a debt due from the garnishee, David Thompson, and on the 26th of June, 1863, obtained an order directing the garnishee forthwith to pay the judgment creditor the debt due from him to the judgment debtor, so much thereof as would satisfy the judgment debt; that the garnishee did not pay the amount directed to be paid, be any part thereof, and before execution issued died; that Thomas Brunskill and Andrew Stoddart were executors of the deceased garnishee.

Robert A. Harrison shewed cause, contending that no suggestion could be entered where there is no roll upon which to enter it; that an attaching order is not a judgment, and even if a judgment, there is no roll; that there can be no suggestion entered on a judgment order. He referred to Eng. Stat. 1 & 2 Vic., cap. 110, s. 18, and *Farmer v. Mottram* (1 D. & L. 781).

Tilt supported the summons. He argued that for all purposes the order to pay must be deemed a judgment. Con. Stat. U. C., cap. 24, s. 15. He also referred to *Swan*

v. Cleland (13 U. C. R. 335); Moor v. Roberts (3 C. B. N. S. 830).

DRAPER, C.J.—I am satisfied that I have no authority to order or permit a suggestion to be entered of the death of a garnishee so as to legalize execution against his executors or administrators. Very extensive powers to enter suggestions are given by law, but I find none applicable to such a case as this. I must discharge this summons.

Summons discharged.

MASON V. MORGAN.

Certiorari—Declaration for a different cause of action—Setting aside.

Held, 1. That although a plaintiff may, after removal of his plaint from a Division Court, declare in the Superior Court in a different form of action he cannot declare for a different cause of action.

Held, 2. That if a plaintiff in such a case vary his cause of action in his declaration the declaration may be set aside as irregular with costs.

Held, 3. That where plaintiff sued in the Division Court for injuries done to a filly by a bull, alleged to belong to defendant, and afterwards declared in the Superior Court for entry by defendant on land of plaintiff with the bull, and tearing up the earth and soil, &c., the cause of action was varied.

[CHAMBERS, March 29, 1864.]

During the month of October last plaintiff had a filly, which was gored, as he supposed, by a bull belonging to the defendant, the defendant and the plaintiff being at the time adjoining farmers in the Township of Scarborough.

On or about the 27th January last plaintiff caused defendant to be summoned before a magistrate to answer a charge "for that he the defendant did on or about the 20th October, 1863, in the Township of Scarborough, wilfully, negligently and maliciously commit damage to the personal property of the plaintiff."

Defendant appeared before the magistrate, and objected that the magistrate had no jurisdiction, to which view the magistrate acceded, and so dismissed the complaint.

Plaintiff then, on the 8th of February last, caused defendant to be sued in the Twelfth Division Court of the United Counties of York and Peel, for the same alleged wrong, claiming "the sum of \$99 for damages sustained."

On the 17th of same month of February, defendant obtained and issued a writ of certiorari, directed to the Judge of the Division Court for the removal of the plaint.

The certiorari was duly returned into the Court of Queen's Bench, and the plaint was removed from the Twelfth Division Court of York and Peel.

Plaintiff thereupon declared in trespass—"For that the said defendant broke and entered a certain close of the plaintiff called and known as lot thirty-one, in the third concession of the Township of Scarborough, in the County of York, one of the united counties aforesaid, and then and there with a certain bull of the defendant's, tore up, damaged and spoiled the earth and soil of the said close; and also then and there with the said bull, cut, gored, wounded and killed divers, to wit, two horses of the plaintiffs, then and there found and being quietly depasturing in the plaintiff's said close, and other wrongs to the plaintiff did, to the plaintiff's damage of three hundred dollars: and therefore, he brings this suit, &c.

Robert A. Harrison, for the defendant, obtained a summons, calling upon plaintiff to shew cause:

1. Why the declaration, copy and service thereof should not be set aside, upon the ground that the declaration was not for the cause of action, in respect of which the plaintiff sued in the Inferior Court.

2. Or why the declaration should not be set aside or struck out as tending to embarrass the fair trial of the action.

3. Or why the declaration should not be amended, so as to make the same conform to the plaint laid by plaintiff in the Inferior Court, on grounds disclosed in affidavits the papers filed.

Bell, Q.C., shewed cause. He contended that the declaration was for the same cause of action as in the Court.

below: that it might be in a different form, but that so long as the cause of action was the same the difference in the form of action was of no consequence. He cited *Gun v. Machenry* (1 Wils. 277); *Bowerbank v. Walker* (2 Chit. R. 517); *Blacklock v. Millikan* (3 C. P. 34).

Robert A. Harrison, in support of the summons, argued that the cause of action in the Court below was the entry of the bull, to sustain which proof of scienter would be necessary; but that here the cause of action was the entry of the defendant with the bull—a cause of action in respect of which plaintiff could not sue in the Division Court, and probably not in any Court. He cited *Beckwith v. Shore-dike* (4 Burr. 2092); *Coward v. Boddeley* (4 H. & N. 478); *Chit. Archd.* 9 edn. 1247.

DRAPER, C.J.—The first summons to the defendant states the cause of action to be that the defendant did “wilfully, negligently and maliciously commit damage to the personal property” of the plaintiff.

This was issued by a magistrate, and on the hearing dismissed.

The plaintiff then sued out a summons from the Division Court, to answer “in an action for damages, for the causes set forth in the plaintiff’s statement of claim hereunto annexed.” That statement was—“William Mason claims of John Morgan the sum of ninety-nine dollars for damages sustained.”

The affidavit on which the writ of certiorari was granted shews distinctly that the plaintiff was complaining that defendant’s bull had gored a filly belonging to the plaintiff.

The plaintiff has now declared, “for that defendant broke and entered a close of the plaintiff, called, &c., and then and there with a certain bull of defendant’s, tore up, &c., the earth and soil, and there with the said bull gored, wounded and killed two horses of the plaintiff’s, then and there found and being depastured in plaintiff’s close.”

It seems to me that this not merely varying the form of action in the Court below, but varying the cause of

action, and stating one not only not instituted in the Court below, but which could not have been instituted there.

If the plaintiff had sued in the Division Court for damages for breach of contract, and had, on the cause being removed by certiorari, have declared for breach of promise of marriage, he would, according to the argument relied on for the plaintiff, have been regular, though the Division Court Act expressly enacts that those Courts shall not have jurisdiction in cases of breach of promise of marriage.

I have not overlooked the provision in the C. L. P. Act, that a plaintiff may join different causes of action in the same suit; but I apprehend it applies to suits instituted regularly in the Superior Courts, and not to such as are removed by certiorari. Here, too, the plaintiff has not joined different causes of action, but professes to declare on the cause of action in the Court below. I think the declaration is irregular, and must be set aside with costs.

Summons absolute with costs.

SOMERS V. CARTER.

Security for costs—Time for application.

An appearance was entered on 13th September, 1862, declaration filed on 29th of same month, order for security for costs obtained on 7th October, 1862, on the ground that plaintiff had left Canada, and that order rescinded on 11th March, 1863, on the ground of his return. Plaintiff again left Canada in October, 1863. An application was again made in March, 1864, for security for costs.

Held, not to be too late; there being nothing to shew when defendant first had notice of plaintiff leaving in October, 1863, or that defendant had taken any steps in the cause, between that date and the date of his application.

[CHAMBERS, March 30th, 1864.]

This was a summons calling upon plaintiff to shew cause why all the proceedings in the cause should not be stayed, until security for costs were given by plaintiff to defendant.

On the 13th September, 1862, the defendant entered his appearance.

On 29th of same month, declaration was filed.

On 7th October, 1862, defendant obtained an order for security for costs, on the ground that plaintiff had left Upper Canada and was resident in the State of Michigan.

On 9th of the same month the order for security for costs was served.

On 11th March, 1863, the defendant, upon an affidavit that during the month of October preceding he had returned to Canada, and was at the time of the application residing in the Township of Norwich, in the County of Oxford, as his usual and permanent place of residence, obtained an order rescinding the order of 7th October, 1862, directing security for costs to be given.

In October, 1863, plaintiff again returned to the United States of America, there to reside.

On 21st March, 1864, notice of trial was served for the then coming assizes, to be holden on 30th of same month, for the County of Oxford.

On 24th March, the affidavits were sworn on which to apply for a second order for security for costs.

On 26th of same month the summons was granted.

There was nothing to shew either when the pleas were filed, or when issue was joined in the cause.

S. Richards, Q.C., for defendant.

W. Freeland, for plaintiff.

DRAPER, C.J.—The only objection I see to the defendant's application is the apparent delay. The plaintiff left Canada in October, 1863—and this application is just made. It is not shewn that the defendant only recently discovered that the plaintiff had gone; but this case differs from any that I can find. The defendant applied early, and obtained an order for security for costs in October, 1862. No security was given, and in March, 1863, the plaintiff got that order rescinded, on the ground that his absence was temporary and he had returned. Since then no step has been taken in the cause, until the 21st of this month, and the defendant makes this application immediately thereafter.

In *Duncan v. Stint* (5 B. & Al. 702), reference is made to a previous case, where the Court said, "Where a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England."

In *Wainwright v. Bland* (4 Dowl. P. C. 547), there had been a trial, and the application for security was made after notice of trial again given. The defendant admitted that he knew the plaintiff had gone abroad before the trial, and it was held he was too late, and that he should have moved before, as expense might have been unnecessarily incurred.

In *Brown v. Wright* (1 Dowl. P. C. 95), the Court quote an act upon the passage cited from *Duncan v. Stint*.

Doe v. Brood (1 Dowl. N. S. 857), proceeds on the same principle, and so in *Foster v. Coster* (8 A. & E. 419 in notes).

There is nothing to shew when plea was pleaded, or issue joined, unless the latter step were taken by the plaintiff on the day on which he gave notice of trial.

The declaration was filed on 29th September, 1862, and as the first order for security for costs was not obtained until 7th October, 1862, the plea was probably pleaded before that order. If so, no step in the cause, strictly speaking, has been taken since then, for the order for security and the order rescinding it, are collateral proceedings.

It appears to me, therefore—looking at the plaintiff's delay in proceeding, at the fact that it does not appear that the defendant took any step in the interim, and considering what I take to be the principle of the cases cited—that I should make this order.

Order accordingly.

HENDERSON V. CAPMAN AND GEREAU.

Master and Servant—Action for negligently setting fire to plaintiff's barn—Pleading—Materiality of allegations in declaration—Effect of not guilty—Evidence.

The first count of a declaration for setting fire to a plaintiff's barn, &c., alleged that the plaintiff *at the time when, &c.* was possessed of a farm, &c., that the defendant Chapman was *at the said time*, possessed of the southerly portion of the lots of which the plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, &c., and that by reason of negligence and carelessness the fire spread to the plaintiff's land and burned his barn, &c.,

The third count alleged possession of the plaintiff and Chapman, as in the first count: it then described the defendant's premises, as adjoining the plaintiff's premises, and then alleged that Gereau by the order, &c., of Chapman, he the said Gereau *being at the time* in the service and employ of Chapman, set fire to a brush heap, &c., and the defendant did not use due care, &c., whereby, &c.

Held, 1. That the allegation that Gereau was at the time when, &c., was a material allegation.

2. That the allegation of Gereau *being, &c.*, in the first count referred to the *time* stated, namely, at the time of the committing, &c., and was sufficiently certain.

3. That the allegation distinctly appeared in the first count, and was quite distinct from the wrongful act alleged.

4. That the allegation that Gereau was at the time when, &c., was not in issue under the plea of not guilty, and should, if intended to be disputed, have been specially traversed.

[CHAMBERS, May 2nd, 1864.]

The first count of the declaration stated that the plaintiff, at the time when, &c., was possessed of a farm, &c., that the defendant Chapman was at the said time, possessed of the southerly portion of the lots of which the plaintiff had the northerly parts, and that Gereau, being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, for the purpose of clearing a portion of said land, and that by reason of negligence and carelessness, the fire spread to the plaintiff's land and burned his barn, stable and shed, &c. The second count stated that the plaintiff when, &c., was possessed as in first count, and the defendants negligently set fire to a brush heap on a particular lot for the purpose of clearing the said lot, and by reason, &c. The third count alleged the possession of the plaintiff and Chapman as in the first count; it then described the defendant's premises,

and that there was only a concession road between them, and then it alleged that the defendant Gereau, by the order, instruction, sanction and permission of Chapman, he the said Gereau being at the time in the service and employ of Chapman, set fire to a brush heap, &c., and the defendants did not use due care, &c., but by reason of the negligence of both the defendants, &c., and concluded as in the first count.

The defendants pleaded separately, not guilty.

The cause came on for trial at the last Kingston Assizes, before Mr. Justice Adam Wilson, when he decided that the pleas of not guilty did not put in issue the fact of Gereau being the servant of Chapman, and allowed a plea to be added denying the same, and as the plaintiff said he could not proceed with the trial if this new issue were raised, the learned Judge put off the trial on payment of costs by the defendant.

Afterwards, the learned Judge not being satisfied that his ruling was correct, and thinking that as the declaration was framed, the fact of Gereau being such servant was not positively and affirmatively alleged as "at the time of the committing of the grievance," he told the defendant's attorney he would grant him a summons, calling on the plaintiff to shew cause why the defendant should not be relieved from the payment of costs, if he desired it.

Accordingly a summons was granted by the learned Judge at Kingston, returnable before him there, but was enlarged before him at Toronto.

S. Richards, Q.C., for plaintiff.

Sir H. Smith, Q.C., for defendant.

Mitchell v. Crassweller (13 C. B. 237), was cited during the argument.

ADAM WILSON, J.—I have examined the different authorities bearing on this question, and it appears that the test whether the allegation of a person being the servant of another is put in issue or not, is this—if the allegation be

that, at the time when the wrongful act was committed, such a person was such servant, and that such servant did the wrongful act, then the fact of being such a servant is made a material allegation, and if not traversed, is not in issue, but is admitted.

In actions for criminal conversation or seduction, where it is alleged that the defendant had carnal knowledge of the plaintiff's wife or seduced the plaintiff's servant, the fact of the person being the wife or servant is not disputed, unless specially denied; because such fact is distinctly asserted, and is a fact distinct from the wrongful act complained of.

It is said in the cases that the plaintiff alleges that his rights have been invaded, and that the defendant is the person who has invaded them; that there are thus two propositions presented, and if both are meant to be disputed, the right of the plaintiff as well as the wrongful act of the defendant, must be traversed, and that not guilty only denies that the defendant did this wrongful act, i.e. committed the seduction, &c., and does not deny that the plaintiff's right has been invaded, or in other words, does not deny that it was the plaintiff's wife or his servant who was the person seduced. See *Kendrick v. Horder* (7 El. & Bl. 628); *Torrence v. Gibbins* (5 Q. B. 297); *Ford v. Langlois* (19 U. C. R. 312).

So it would seem to follow that when the plaintiff says, the defendant by one A. B., then being his servant, wrongfully set fire to a brush heap, by which the plaintiff's property was destroyed, he states two propositions:—

1. That A. B. was then the defendant's servant, and
2. That defendant by A. B., wrongfully set fire to the heap.

The wrongful act is the negligently setting fire to the brush heap by the defendant. The allegation that A. B. was the defendant's servant at the time, is no part of the wrongful act, but is altogether a distinct allegation. See *Paton v. Rea* (2 C. B. N. S. 606); *Hart v. Crowley* (12 A. & E. 378).

It is not necessary that such a statement to be material, should be set out in an inducement to the count, as appears by the cases of *Dunford v. Trattles* (12 M. & W. 529);

Grew v. Hill (3 Ex. 801); and Kendrick v. Horder, in which the whole allegation is contained in the charging part of this count, but if an inducement is used, it appears to be of no consequence in what part of the declaration it is contained, whether at the beginning or at the end.

Applying these views to this declaration, does it appear that it is anywhere distinctly alleged that at the time of the wrongful act, Gereau was the servant of Chapman? I think it does so appear expressly in the third count, however it may be in the first count. This substantially settles the question. The fact of Gereau being Chapman's servant at the time of the alleged negligence is expressly asserted, and was not therefore in issue at the trial under the plea of not guilty. The order, therefore, which was made at the trial, ought to be allowed to stand.

The argument, both at the trial and in Chambers, took place chiefly on the first count, and I may say that I think my first impression was correct, and that the allegation of Gereau being the servant, &c., refers to the time stated, namely, at the time of the committing of the grievances, just as in the case of Mitchell v. Crassweller (13 C. B. 237), where the word being was held to apply to the next antecedent date; but that was not stated, as here to have been at the time of the committing of the grievances, but simply on the 8th of September, 1852, which might have been an entirely different date from that on which the grievances were committed, and which it was held was rather to be so inferred than otherwise, so that the reason which was given for holding that that declaration did not sufficiently assert that the person was then the defendant's servant is the very reason why the first and third counts must be held in this case sufficiently to assert that fact.

I must therefore discharge this summons, but without costs, as it was taken out at my request. I very much regret that I postponed the trial at all, notwithstanding the amendment, for I am now persuaded the plaintiff ought to have been ready to have met this allegation, and that he was as ready as he probably ever will be to meet it, and I regret

this the more as I had already devoted nearly a whole day to the case, as far as it went, before this question of amendment arose.

Summons discharged without costs.

HAROLD AND WIFE V. STEWART AND MOORE.

Ejectment—Limited defence—Judgment—Execution—Irregularity.

Where there is a limited defence in ejectment, it is irregular for the plaintiff to enter judgment without first obtaining a Judge's order, or a rule of Court authorizing the signing of judgment, which rule or order, or a duplicate thereof, must, under Rule 92, be filed together with the writ.

Seemle, the writ of execution in ejectment should, as in other actions, follow the judgment, and where, by reason of a limited defence, the plaintiff is entitled to recover less than what he claims in his writ of summons, there should be some entry on the roll to authorize the deviation.

[CHAMBERS, May 23, 1864.]

This was a summons calling upon the plaintiff in ejectment to shew cause why the judgment execution and all subsequent proceedings should not be set aside for irregularity with costs.

The writ of ejectment claimed possession of the north-west half of the west half of lot number eighteen in the fourth concession of the township of Esquesing, containing fifty acres more or less, also the north half of the north-east half of said lot, containing fifty-one and thirty-seven hundredths acres more or less, setting out the lands by metes and bounds.

The defendants limited their defence as follows:—

To that part of the north half of the north-east half of number eighteen, contained in the following boundaries—commencing at the gate on the fourth line at the entrance of the lane: thence running up the southwardly fence of said land to the south-west corner of the driving house; and thence forming a jog and running south-west, so as to divide the said half-lot in two portions of equal extent to

the line between the north-easterly and south-westerly halves of said lot; then south-eastwardly along said division line to the side road; thence eastwardly along the side road to the concession line; thence north-westerly along that line to the place of beginning.

Upon this limited defence the plaintiffs signed judgment as follows:—"As no appearance has been entered or defence made to the said writ except as to the said part, therefore it is considered that the said plaintiffs do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that they have execution forthwith."

Upon this judgment plaintiffs issued execution, not however following the judgment.

The summons was to shew cause on the following grounds:

1. That the judgment had been signed without first obtaining a Judge's order or rule of Court authorizing the signing of it.

2. That if such order had been obtained, the same, or a duplicate, had not been filed with the judgment and with the writ of summons.

Or why the execution should not be set aside, because it did not follow the judgment, but directed the sheriff to give possession of a portion of the premises for which the defendants had defended.

The plaintiffs filed an affidavit of a licensed surveyor to the effect that he had made a survey of the land in dispute, and that he had handed the plaintiff's attorney a description of the part of the north half of the north-east half of eighteen for which the defendants did not defend; and that the description of the north half of the north-east half of the lot in no way interfered or encroached upon that part of the lot for which the defence was entered.

Wells shewed cause. The Rule 92 (Har. C. L. P. Act, 634), does not require an order or rule to be obtained preparatory to signing judgment or issuing execution when the defence is limited, but only when personal service has not been made; and the plaintiffs are at liberty to issue their

writ of possession, describing the premises altered, as they necessarily are, by excluding from the former description the portion for which the defendants defend, as set out in their notice limiting their defence.

C. S. Patterson, in support of the summons, opposed both of these propositions.

ADAM WILSON, J.—The rule in question provides that “no judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the C. L. P. Act, 1856, together with a writ or a copy thereof, where there is a limited defence, or where personal service has not been effected, without first obtaining a Judge’s order or a rule of Court authorizing the signing such judgment, which said rule or order or a duplicate thereof, shall be filed together with the writ.”

I read this rule as providing that, in all cases where the defence is limited, or personal service has not been made, judgment shall not be signed without first obtaining a rule or order authorizing it to be signed, and that the rule or order, or a duplicate of it, must be filed with the writ.

In this case there is a limited defence, and judgment has been signed without the plaintiffs having first obtained a rule or order permitting it to be signed.

Upon this ground, therefore, the judgment and all proceedings had thereon must be set aside for irregularity, with costs, as a wholly unauthorized proceeding, and one directly in violation of the terms of the rule in question.

As to the other ground that the execution does not follow the judgment, I think this is also a valid objection.

The rule is, that execution must follow the judgment, or show some reason why it does not, and what warrants the variance, *Bicknell v. Wetherell* (1 Q. B. 914); *Phillips v. Birch* (4 M. & G. 403); *Doe dem Saul v. Dawson* (3 Wils. 49); *Gore Bank v. Dunn* (1 U. C. Cham. R. 170). The Court or a Judge cannot tell, judicially, that the courses or distances in the writ of possession do properly describe the premises in the writ of ejectment, excluding the portion for

which the defendants have appeared and defended. And, besides this, it does not clearly appear that there are such changes from the writ which no defence on the part of the defendants could render necessary, or justify, and there is no entry on the roll which authorizes any deviation.

The plaintiffs are in truth attempting to make the Court do for them what they ought to do for themselves, viz., take possession of the property they claimed to have obtained judgment for, at their own peril.

In *Adams on Ejectment* it is said now to be the practice of the Sheriff to deliver possession of the premises recovered according to the directions of the claimant, who acts at his own peril (*Ib.* 307). And it was to provide against any injurious consequences to himself, from following the claimant's directions, that he usually demanded, and it was supposed he was entitled to require indemnity from the claimant before executing the writ (*Ib.* 308). But as the plaintiff is now a real person, it is said the Sheriff cannot refuse to obey the writ unless he be indemnified. See also *Cottingham v. King* (1 Burr. 629); *Connor v. West* (5 Burr. 2672); *Doe dem The Queen v. The Archbishop of York* (14 Q. B. 81, 109).

I think the judgment, execution, and all subsequent proceedings, must be set aside with costs.

Summons absolute, with costs.

THE QUEEN V. SIMPSON.

Con. Stat. U. C., c. 24, s. 19—Service of summons for order for the payment of money—Personal service—How and when dispensed with.

Where an order for payment of costs is sought, which may, under Consol. Stat. U. C., cap. 24, s. 19, be followed by execution, the service of the summons must, in general, be personal.

The Court may, under special circumstances, dispense with personal service.

Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that the defendant is keeping out of the way to evade service; and even in this case, it is by no means clear that personal service will be dispensed with.

Service on the attorney on the record, and on the wife of the defendant, it not being shewn that the defendant was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada and gone to reside in the United States of America.

[CHAMBERS, May 24, 1864.]

Kingstone obtained a summons calling on Horace H. Hawkins, the private prosecutor in this cause, to shew cause why the order of Mr. Justice Adam Wilson, of the 25th of May last, should not be rescinded, and why the copy and service thereof should not be set aside on the grounds that—

1. The summons on which the order was made was not personally served on defendant, and no order was made dispensing with personal service.

2. Neither the allocatur nor the summons was personally served on the defendant.

3. The defendant's wife had not time to shew cause against the summons before it was made absolute.

4. The affidavits of service do not shew that the original summons was shewn to the persons on whom the same was served.

5. The affidavit of service on the defendant's wife does not allude to any summons or copy of summons thereto annexed.

And why the said Hawkins should not pay the defendant the costs of this application, and with a stay of proceedings.

The defendant was indicted for publishing a libel. He appeared and pleaded by attorney under the Consol. Stat. U. C. ch. 103, and was convicted. The private prosecutor

then took proceedings for costs under ss. 14, 15, and 16 of that Act.

A summons was taken out by the private prosecutor, calling on the defendant to shew cause why he should not pay the sum of £27 5s. 5d., certified by the Clerk of the Crown and Pleas on the 16th of May, 1864, to be costs sustained by the private prosecutor, and also the costs of the application.

This summons was served on the attorney on record for the defendant by serving a copy on his Toronto agent.

The summons, on its return, was enlarged until the defendant should be served.

The affidavit of service stated that the copy of the power of attorney from the private prosecutor to Mr. McDougall (who made the service upon her), and a copy of the allocatur and of the summons was served on the defendant's wife at the last place of residence of the defendant. That the defendant had left the country and gone to the United States, and meant to live there permanently, as the deponent was informed and believed, and that he cannot be served with any papers, as his whereabouts was unknown. The affidavit also stated that the money was demanded of the defendant's wife, who did not pay the same, and that the amount was unpaid.

Before the summons was granted there was an affidavit of similar services having been made on the attorney on record for the defendant, and that he had refused to pay the amount.

Prince shewed cause.

Kingstone supported the summons. Personal service was necessary: *Clifton v. Durand* (3 Prac. Rep. 60); *Wilson v. Foster* (1 D. & L. 496); *Winwood v. Holt* (3 D. & L. 86); *Hawkins v. Benton* (2 D. & L. 466, 470).

If personal service was not made, an order dispensing with it was necessary: 2 Arch. Pr. 1567, 1569.

If allocatur not personally served, the rule must be personally served. *Hawkins v. Benton* (2 D. & L. 466, 470, in notes).

The affidavit of service of summons should have referred to summons as "hereunto annexed:" *Fidlett v. Bolton* (4 D. P. C. 282; 1 Arch. Pr. 162, 1570). As to service of the summons, see *Kitchen v. Wilson* (4 C. B. N. S. 483).

ADAM WILSON, J.—The practice is said to be that the Court will not grant a rule for payment of money unless the same formalities as to service, &c., are observed as in the case of an attachment (Arch. P. 11 Ed. 1583). Therefore, a rule will not be granted calling on a party to pay money mentioned in the Master's allocatur, unless the allocatur be personally served. *Ibid*, citing *Doe d. Steer v. Bradley* (1 D. N. S. 259). But, under special circumstances, the Court will dispense with personal service. *Ibid*, citing *Hawkins v. Benton*, *supra*; *Doe d. Steer v. Bradley* *supra*; *Smith v. Troup* (7 C. B. 757). See also *Allier v. Newton* (2 D. P. C. 582); *Thomas v. Rawlings* (4 H. & N. 875).

Some strictness is to be observed in services of this kind, when the order is in the nature of a judgment, and to be followed by writs of execution, as in the case of a judgment at law in a civil action. (Con. Stat. U. C., cap. 24, sec. 19).

The rule being that personal service shall be made, and that it shall be dispensed with only in certain very rare cases, I shall examine whether the facts of this case bring it within the limits of those cases in which personal service has been excused.

In *Clifton v. Durand* (3 Prac. Rep. 60), a summons of a similar kind was held not to have been well served by service on the defendant's daughter at his dwelling house, upon its being shown that he was not found at his office—it appearing that he was in the country and would be back in a day or two—because the service should have been personal, or there would have been an order dispensing with such kind of service.

In *Wilson v. Foster* (6 M. & G. 149), putting up a copy in the Master's office and leaving a copy at the defendant's last known place of abode was not allowed to be good service, the defendant being abroad.

In *Hawkins v. Benton* (8 Jur. 1122), a demand of the amount of the award and allocatur was made by letter, the receipt of which was acknowledged. Defendant, an attorney, by his town agent, took a copy of the award. Service was also made at the defendant's dwelling house on his clerk, by delivering a copy of the award and allocatur and showing him the originals. A rule to shew cause was then granted.

In *Winwood v. Holt* (9 Jur. 454), the award and allocatur and the rule making the submission a rule of Court, had been personally served, and a demand made of the amount. A rule was then granted on the defendant to shew cause why he should not pay the amount. A copy of this rule was delivered at the defendant's residence to his wife, and the original rule shewn to her. Alderson, B., said, "Under the circumstances of this case you had better serve the defendant personally. There is every reason to suppose you can do so, for it appears that you know where he lives." The rule was then enlarged to make a personal service.

In *Smith v. Troup* (7 C. B. 757), the defendant was served with a copy of the award and of the rule making the submission a rule of Court, and of the appointment to tax costs. The defendant's attorney attended the taxation. The defendant was personally served by a process server with a copy of the allocatur and power of attorney, and a written demand of payment signed by one of the attorneys under the power, the originals being then shewn to him. On affidavits setting forth the facts and shewing repeated attempts by one of the attorneys to make a personal demand upon the defendant, and his inability to do so in consequence of the defendant's migratory habits, and that the money was still unpaid, a rule to shew cause was granted why the money should not be paid. Wilde, C.J., said, "I never knew the Court dispense with personal service in a case of a proceeding to attachment, except when the party was shewn to be keeping house so as to evade the service. The case of *Hawkins v. Benton* shews that the Court will dispense with the strict observance of the rule requiring the demand to be personal, where it is made evident to them that the

party has been evading service. The affidavits in the present case are extremely strong to show how industriously the defendant has been hunted from place to place for the purpose of making a personal demand on him. I therefore think this is a case in which the strict rule may, on the authority of *Hawkins v. Benton*, be dispensed with."

In *Kitchen v. Wilson* (4 C. B. N. S. 483), an application was made to make the service on Wilson's partner a good service of the writ of summons on Wilson, because he was in America; his address there not being known, and he having no private residence here. The Court said, "There is nothing to show that Wilson is keeping out of the way to evade service." The rule was therefore refused.

In *Thomas v. Rawlings* (4 H. & N. 875), the London agents of the defendant were served with a copy of the award and the rule of Court. The defendant had sold all his stock and the house appeared deserted. The defendant made an appointment for a meeting on Sunday, but refused to appoint another day. The defendant's house had been watched, and it was believed the defendant was lurking inside, the doors being kept locked and the windows nailed down. The defendant's wife had been seen and everything was explained to her, and copies of papers were left with her to deliver to her husband, but she refused to do so, and in spite of every effort, it had been found impossible to serve him personally. Pollock, C. B., said, "We cannot break in on an established rule of practice. There may be an exception where personal service is actually begun and is then interrupted or prevented by an assault; but the evasion of service which will suffice to dispense with personal service in ordinary cases will not suffice in cases of attachment. No doubt there have been cases in which, under peculiar circumstances, personal service even in such cases has been dispensed with; but we do not think that there are here such circumstances as ought to dispense with the service which the ordinary rules of practice require." Watson, B., said, "There is no case in which personal service has been wholly dispensed with in case of an attachment, though there may be some in which an in-

complete personal service has been aided." The rule was refused.

The result of all these cases is, that where personal service of part of the proceedings has been made on the defendant, as in *Winwood v. Holt* and *Smith v. Troup*, the Court will, under special circumstances, dispense with personal service of the rest of the proceedings (4 H. & N. 875). But where the defendant is abroad (6 M. & G. 149; 4 C. B. N. S. 483), or it is known where he lives (9 Jur. 454), personal service will not be dispensed with, unless it appears the defendant is keeping out of the way to evade service (4 C. B. N. S. 483; 7 C. B. 757); but even in such a case, it is not certain the established rule of practice requiring personal service will be dispensed with (4 H. & N. 875).

In the case now before me, the attorney on the record and the wife of the defendant have been respectively served with the allocatur and power of attorney to demand and receive the costs, and demands have been made upon them; and the excuse for not making personal services upon the defendant is, "That he has left this country and gone to reside in the United States of America, and means to live there permanently, as the attorney for the private prosecutor is informed and believes, and he cannot be served with any papers as his whereabouts is unknown."

The defendant has never been personally served with any of the proceedings which have been lately taken against him, and he does not even know of such proceedings being carried on against him. It is not shewn that the defendant has left the country to evade a personal service being made upon him, or that any and what enquiries have been made as to his present residence, from which it may appear whether he can or cannot be personally served in the foreign country. This is not at all like the case where the affidavit showed "how industriously the defendant had been hunted from place to place for the purpose of making a personal demand on him," and on which personal service was excused; but there it must be remembered that the defendant had been personally served with all the papers and even with a writ-

ten demand of payment—but this demand was served by a process-server who had no special or proper authority to make it—the essential acts had all been performed personally, and all that was asked was to execute this personal demand under very strong and peculiar circumstances. Nothing approaching to such a case is made out on this occasion.

I therefore think the order in question must be rescinded.

THE QUEEN EX REL. HEENAN V. MURRAY.

Election of Reeve—Precedure—Time.

Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk, in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held to be duly elected.

Though the statute declares that the members of every municipal council shall hold the first meeting *at noon*, and at such meeting organize themselves as a council by electing one of themselves as a reeve, an election at six o'clock, p.m., on the same day, is a sufficient compliance with the statute."

[CHAMBERS, March 12, 1864.]

The relator complained that Thomas Murray, of the village of Pembroke, merchant, had not been duly elected, and had unjustly usurped the office of reeve of the municipality of the said village of Pembroke, under the pretence of an election, held on Monday, the 18th of January, 1864, at the town hall in the said village of Pembroke; and declaring that he, the said relator, had an interest in the said election as one of the municipal councillors for the said municipality of the village of Pembroke, and a candidate at the said election for the said office of reeve, showed the following causes why the election of the said Thomas Murray to the said office should be declared invalid and void, viz.: first, that there were only two members of the said council, viz., the said Thomas Murray and John Supple,

present when the said alleged election took place; second, that no vote in favour of the motion to elect the said Thomas Murray was given by any of said councillors; third, that the clerk of the said council illegally declared the said Thomas Murray duly elected reeve, without taking the vote of the councillors upon the motion to elect him as reeve; fourth, that the said election did not take place at noon of the third Monday in January, as required by law, but about the hour of six o'clock in the evening of that day.

The relator made oath, that he was one of the councillors for the municipality of the village of Pembroke for the year 1864; that the council of the village of Pembroke is composed of five members; that on Monday, the 18th day of January, instant, the following four members elect of the said village council, viz., John Supple, Michael O'Meara, the said Thomas Murray, and the relator, met at the town hall of the said village of Pembroke; that Alexander Moffat, one of the councillors elect, was not present at said meeting; that Andrew Irving, the clerk of the said council, presided at said meeting; that after the said four members of council had made their declarations of office and of qualification, it was moved by the said John Supple, and seconded by the said Thomas Murray, that the said Thomas Murray be reeve of the said village; that upon the motion being put by the said clerk to the said council for their vote on the same, the relator objected to the election of the said Thomas Murray to the office of reeve, and made his objection known to the said clerk and members present of the said council; that the said Michael O'Meara also objected to the election of the said Thomas Murray as reeve, and made his objection known to the clerk and members present of the said council, calling out in answer to the said question the said words "No, no;" that thereupon, and before any vote was taken upon the said motion, the relator and the said Michael O'Meara were in the act of going out of the door of the said council room, having left their seats at the council for the purpose of leaving the same and without any vote having been taken on the said motion; the said clerk, Andrew Irving, said that if no amendment was

made to the said motion, he would have to declare the said Thomas Murray duly elected reeve of the said village of Pembroke; that no vote was taken or given by any member of the said council on or for the said motion; that the said Thomas Murray accepted the said office of reeve, and received from the said clerk, Andrew Irving, a certificate under his hand and the seal of the said corporation to enable him to take his seat as a member of the county council of the united counties of Lanark and Renfrew.

Michael O'Meara made oath, that he had heard read the statement and relation of James Heenan in this matter, and that the same was true in every particular; that he had also heard read the affidavit of the said James Heenan, and knew the statements therein contained to be true.

C. S. Patterson shewed cause, and filed the affidavit of John Supple, wherein it was sworn, that he was one of the municipal councillors of the village of Pembroke; that on the 18th day of January, 1864, he attended, as such councillor, a meeting of the councillors of the said village held in the town hall; that the following councillors were present, viz., Thomas Murray, Michael O'Meara, James Heenan, and deponent, at said meeting; that the said councillors then made the declaration of office required by law; that after the said councillors made the declaration of office, and whilst the four of them were still present, Andrew Irving, the clerk of the municipality, called the council to order and said, "Now is the time to elect your reeve," or words to that effect; that immediately after the clerk made the announcement, and whilst the four councillors were present, a resolution was placed in the clerk's hands, moved by deponent and seconded by Thomas Murray, to the effect that Thomas Murray be reeve; that the clerk read the resolution to the council, the four being still present, and said if there were no amendment offered he would have to declare it carried; that after a sufficient time had elapsed for an amendment to be put in, and there being none moved, and whilst the four councillors were still in the hall, Thomas Murray called "Question!" when the

clerk again read the resolution, and, there being no dissenting voice, declared the motion carried, and that Thomas Murray was duly elected reeve of the village of Pembroke; that at the time the clerk declared the said Thomas Murray elected, the four councillors were still present, and must have heard the declaration of the clerk, as he spoke in a loud tone of voice, and the room in which the meeting was held is small; that the said relator, James Heenan, was not a candidate for the said office of reeve, nor was there any other candidate for the said office at the said election except the said Thomas Murray, nor was the said James Heenan's name mentioned, or that of any other person, at the said election, in connection with the said office, other than the said Thomas Murray.

The affidavit of John Supple was corroborated by the affidavits of Richard Fallow and James P. Moffatt, both electors, who happened to be present when defendant was declared elected by the clerk.

R. A. Harrison supported the summons, and cited Con. Stat. U. C. cap. 54, secs. 130, 132.

HAGARTY, J.—The statute directs, that the council, being at least a majority of the whole number of the council when full, shall, at their first meeting, after making the declarations of office and qualification, organize themselves as a council, by electing one of themselves to be reeve, &c. (Sec. 132).

At the first meeting here, four councillors were present, and they should, according to the statute, have chosen their reeve.

The relator and his fellow-councillors admit that a resolution naming Murray as reeve was put and seconded: that he (relator) and the others expressed dissent, and rose to go away; that while in the act of going, the clerk said that if no amendment were moved, he would have to declare Murray elected.

Two witnesses swear in reply that no dissent was expressed to the resolution; that after ample time had elapsed,

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a member called "Question!" and there being no dissenting voice, the clerk declared Murray elected; that when he did so the four councillors were present, and must have heard him do so.

The fact of their being present, and hearing the clerk ask if no amendment moved, &c., is admitted.

It is quite true that the reeve should be elected by a majority. It is equally true that the councillors should, in obedience to the law, have elected, or at least fairly tried to elect, a reeve, at this their first meeting.

The relator and his friend do not assert that when they heard the clerk say he would have to declare Murray elected, they protested or made any further expression of dissent. I think, therefore, we must assume the law to have been complied with, and that when the clerk, trying to do his duty, and to obey the law, in the hearing and presence of the four councillors, declared publicly that if no amendment were moved he would have to declare Murray elected, and no one dissenting therefrom, the latter was elected by a legal vote duly made.

We all know that in representative bodies the great majority of resolutions are passed without any formal voting by yeas and nays.

I cannot but consider that this election should stand.

I think the relator and his friend tried to prevent the law being obeyed. They suggested no candidate of their own, and made no bona fide attempt to have a formal vote taken. Taking their own account, they rose to go away, leaving their legal duty unperformed, and heard notice given that Murray would be elected, if no amendment were offered.

The other objection, that this election did not take place till six o'clock, is too trivial to require serious notice.

The summons must be discharged with costs to be paid by the relator.

Summons discharged with costs.

ANONYMOUS.

Ejectment—Con. Stat. U. C. cap. 27, ss. 57, 58—Lease with right of purchase—Holding over.

The defendant went into possession as tenant of A. under a lease with a right to purchase at a certain sum. He elected to purchase and remained in possession for about a year after the determination of the lease, when plaintiff, the mortgagee of the lessor, brought ejectment and demanded security for costs and damages, as against a tenant overholding.

Held, 1. That the plaintiff was entitled to the relief asked, as the defendant's character as tenant had not been that of a vendee. 2. That it made no difference that the plaintiff was mortgagee of the lessor.

[CHAMBERS, July, 1864.]

This was an action of ejectment.

The plaintiff obtained a summons calling on the defendant to shew cause why the defendant, within such time as the presiding Judge in Chambers should fix, should not enter into a recognizance, by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which might be recovered by the claimant in this action, in pursuance of the provisions of the statute in that behalf.

The plaintiff filed a lease, dated the 15th May, 1860, between A. of the first part, and the defendant, described as a Barrister at Law, of the second part, by which A. let the premises in question in this cause to the defendant for three years at the rent of £50, payable quarterly.

There were the usual covenants to pay rent, &c.

The lease then concluded with a clause that the defendant should have the right of purchasing the premises at any time during the term that he might elect for £837 10s.

A. covenanted for himself, his heirs or assigns, that he or they would, at any time during the term, whenever the defendant should signify his intention to purchase, by mailing a notice of such intention addressed to A. at his last place of residence in Canada, sell and convey in fee simple, free from dower and all other encumbrances whatsoever, the said premises to the defendant in fee for the sum of £837 10s., payable by the defendant after having made such election to purchase.

It was sworn that the defendant had enjoyed the premises during the said three years, and that his interest had expired:

That some short time before the expiration of the lease, the defendant gave notice to A. of his intention to purchase the premises, and demanded an abstract of title; which the defendant said he proceeded to have made out, but had great difficulty in making it.

That about the 29th of September, 1863, the abstract was served on the defendant—that it was afterwards corrected and served again about the 13th of October thereafter, and that he had no objection to it.

The affidavit then set out various facts bearing upon the case and material to be considered, because they were not answered by the defendant, to the effect that the defendant never had any intention of purchasing, and was not acting in good faith, and was insolvent.

The ejectment summons was issued on the 28th of April, 1864, and served on the 30th of the same month.

Before the writ was sued out possession was demanded of the defendant. but he refused to give it up.

He was also served with a notice informing him that he would be required to give security for the costs and damages of this action.

The defendant appeared to the writ, and put in a notice of title, by which he denied the plaintiff's title, and set up title in itself, under the agreement to purchase.

John B. Read shewed cause, contending that the right to purchase upon which the defendant had acted, had put an end to the relation of landlord and tenant between the parties, and therefore the defendant, admitting he was holding possession without a legal title, was yet not holding over his possession as a tenant after the expiration of his tenancy, and could not therefore be called upon to give the security demanded of him; but whatever A. might have been entitled to, this claimant was never so entitled, as he was not the lessor.

Hector Cameron, for the plaintiff, contended that the

existing demise by deed was not put an end to at law upon the election made by the defendant to purchase; that this lease expired by efflux of time, notwithstanding the election so made, and the defendant having remained in possession after the expiration of his tenancy, was a person holding over within the meaning of the statute. He referred to *Robinson v. Smith*, 17 U. C. R. 218; *Henrihan v. Gallagher*, 10 Grant 488, and afterwards on appeal.

ADAM WILSON, J.—The defendant had a term created by deed for three years from the 15th of May, 1860, which would therefore continue to subsist for that period as a valid and legal estate, unless expressly determined by surrender or other effectual method.

The defendant contends that the election which he has exercised to purchase the property in fee simple, has put an end to the term of years, so that, from the time when he gave notice of his election to purchase, he no longer stood in the relation of tenant for years to the owner of the reversion, but in the character of a vendee of the freehold, and when the three years expired by lapse of time, he did not then hold over as a tenant against his landlord, but was in possession as such vendee.

The statute cap. 27 of the Consolidated Statutes for U.C., sec. 58, enacts to the effects following: In case the term or interest of any tenant of any lands, holding the same under a lease or agreement in writing for any term or number of years certain or from year to year, expires, or is determined either by the landlord or tenant by regular notice to quit, and in case a demand of possession be made upon the tenant or any person holding under him, and in case the tenant or person refuses to deliver up possession, and the landlord thereupon proceeds by action of ejectment to recover possession, he may at the foot of the writ address a notice to the tenant or person requiring him to find such if ordered by the Court or a Judge.

Sec. 58. Upon the appearance of the party, and upon the landlord producing the lease or agreement, and

upon affidavit that the premises have been actually enjoyed under the lease or agreement, that the interest of the tenant has expired, and that possession has been lawfully demanded, the landlord may move the Court or apply to a Judge for a rule or summons for a tenant or person to shew cause why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditional to pay the costs and damages which may be recovered by the claimant in the action; and the Court or Judge may on cause shewn, or on affidavit of the service of the rule or summons if no cause be shewn, make the same absolute in whole or in part, and order such tenant or person within a time to be fixed upon, on consideration of all the circumstances, to find such bail with such conditions and in such manner as shall be specified in the rule or summons, or the part of the same so made absolute.

When the defendant elected to buy under the provisions of the lease his right to purchase was the reversionary interest, he did not then necessarily and immediately put an end to his estate for years. In equity no doubt he did do so, or perhaps it might rather be that he would do so or not according as the vendor would or would not be able to perfect the title, and until it was known whether this would be done or not the term would be in suspense and the rent also, as consequent upon it. It might not be beneficial to the tenant that his term should be absolutely determined by his election to purchase without any regard to whether he was to get the benefit of his purchase or not; for in this manner he might lose the interest on a long beneficial leasehold merely by electing to buy the reversion, while the vendor might never be able to perfect his title to it during the time of the treaty for the purchase of the reversion. The term and rent would in equity probably both be suspended, and the tenant would during such suspense be in as a vendee and at interest instead of rent: *Townley v. Bedwell*, (14 Ves. 591).

Besides this it is clear that A. had first to make a good title to the defendant before their relative positions were to be altered, for he is to convey free from all encumbrances,

and the defendant is to pay the purchase money after electing to purchase, and "immediately upon receiving such conveyance free from all encumbrances."

The mere election to purchase, particularly where from a title having to be first made perfect by the vendor, or from any other cause, the tenant may never be bound to accept the reversion, does not operate as a surrender of the term, the term still subsists: *Doe d. Gray v. Stanion*, (1 M. & W. 695); and rent is still distrainable at law for the same: *Tarte v. Darby et al.* (15 M. & W. 601). The term, however, would expire by efflux of time on the 15th of May, 1861.

The question then arises, to what claim is the defendant's prolonged possession referable?

Is it in right of his agreement to purchase, or is it a mere tortuous holding over after expiration of his tenancy?

He was never let into possession as a vendee. He had the right of possession as a tenant when he elected to become a vendee, and his holding over after the term cannot, without the consent of his landlord, be converted by the defendant into an actual assent by the landlord to the rightfulness of such an occupation, commenced at a time when the landlord could neither give nor withhold his consent.

It appears from the papers filed, that the defendant, whatever the landlord meant, intended to keep the possession as a vendee, presuming he had the right to do so; but I think the affidavit filed requires me to consider the proceedings of the defendant with a good deal of caution.

In an ordinary case I might feel much difficulty in saying that the possession of a person having the right to purchase and having elected to purchase, being in possession for about one year after the determination of his lease before the landlord disputed his possession, and negotiating all this time respecting his rights as vendee, was and could only be a possession which such person as a tenant was wrongfully holding over. Yet on the facts of this case, and the character of the defendant's possession not being a question of law, but a matter of fact only, to be ascertained and determined by the circumstances. I do not think I can say that his character of

tenant has ever been clearly and irrevocably altered, so that I think I ought to hold that this defendant is still a tenant wrongfully holding over the possession against his landlord, and that he is within the provisions of the statute in question.

I find no difficulty in extending the same rights to this claimant, who is a mortgagee in fee from A., the lessor, under a mortgage executed before the defendant's lease expired, which I would have extended to A., if he had still continued the landlord, although this is the ground upon which Mr. Read most strongly opposed the present application.

The defendant should therefore be ordered to find security for the equivalent of the rent at \$200 a year from February, 1863, when it was last paid, till November, 1864, when possession may, if it can be, be recoverable, making \$350; and in the further sum of \$100 for the costs of the suit, making a total of \$450. The recognizance will be in a penalty in double this amount, conditioned for the payment of the costs and damages of the suit. The two sureties must also become responsible in the like penalty, but in the same recognizance jointly and severally for the due payment of the costs and damages of this suit; and that this recognizance and security be perfected by the sixteenth day of July instant.

Order accordingly.

PRUDHOMME V. LAZURE.

Certiorari—Application for, by plaintiff, refusd.

Held, that a plaintiff is not entitled to a writ of certiorari to remove his own plaint from a Division Court, he having deliberately selected that tribunal for the trial of it.

[CHAMBERS, October 3, 1864.]

A summons was granted by Mr. Justice John Wilson, on the application of the plaintiff, to shew cause why a writ of certiorari should not issue, to remove a plaint from the

first Division Court of the County of Carleton, to the Court of Common Pleas.

The ground of the application was, that the defendant had put in a set-off to the plaintiff's claim, which, it was alleged, would bring up difficult questions of law.

It appeared from the affidavits, that the plaintiff was aware of this claim of the defendant, for on a former occasion defendant had sued for it, and the now plaintiff had obtained a certiorari, which, however, was rendered abortive by the then plaintiff abandoning his suit.

O'Brien shewed cause, and took the objection that a plaintiff cannot remove his own cause from a division Court by certiorari. He referred to *Denison v. Knox*, (9 U. C. L. J. 241), and the cases there cited.

MORRISON, J.—I must discharge this summons—the plaintiff can discontinue in the Court below at a trifling expense, whereas a proceeding to compel the defendant to appear in Court above is full of doubt and attended with considerable expense. I am told that other Judges have granted orders of this kind, but I do not consider that a plaintiff has a right to remove his plaint from the Court he has deliberately selected.

Summons discharged with costs.

REG. EX. REL. ROLLO V. BEARD.

*Municipal Institutions Act—Disqualification of members of council—
Time to which disqualification relates—Costs.*

Where it was shewn that the firm, of which defendant was a member, dealt in coal and wood, and, during the year 1864, supplied large quantities of both coal and wood to the Corporation of the City of Toronto, without any arrangement as to price or terms of payment, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city. Held, that the defendant was disqualified, as being a person having an interest in a contract with the corporation.

So where it was shewn that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the coal furnished, but the price remained unpaid at the time of the election.

Where it was shewn that the price was paid before defendant took his seat, he was still *held* to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to lose the costs necessarily incurred. Therefore in a case where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him.

[CHAMBERS, February 8, 1865.]

The relator complained that George T. Beard, of the City of Toronto, in the County of York, general merchant, had not been duly elected, and had unjustly usurped the office of councilman for the ward of St. James, in the City of Toronto, in the County of York, under the pretence of an election held on Monday and Tuesday, the 2nd and 3rd days of January last, at the Police Court in the said ward of St. James, in the said City of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, shewed the following cause why the election of the said George T. Beard to the said office should be declared invalid and void—That the said George T. Beard was not at the time of the said election qualified to be a councilman and member of the corporation of the said City of Toronto, in this, that before and at the time of the said election he had, by himself, partners or partner, an interest in a contract or contracts, with or on behalf of the corporation.

The statement was sustained by the affidavit of William Hewitt, of the City of Toronto, hardware merchant, wherein

he swore that he was a householder entitled to vote at the election of aldermen and councilman for the said ward at the election holden on Monday and Tuesday, the 2nd and 3rd days of January last: that George T. Beard was elected one of the councilman for said ward at said election: that he did not vote at said election for the said George T. Beard: that the said George T. Beard was not, as deponent was informed and believed, qualified to be elected a councilman and member of the said corporation in this, that the said George T. Beard had, as deponent was informed, and verily believed, at the time of the election, by himself, his partners or partner, an interest in a contract or contracts with or on behalf of the corporation of the said city: that the said George T. Beard was before and at the time of the said election a member of the firm of "Joshua G. Beard and Sons," wood and coal merchants and stove manufacturers, in the said City of Toronto: that the said Joshua G. Beard, the senior member of the said firm, is, so far as the deponent could ascertain and verily believed, a lessee of the said corporation of the City of Toronto, under a lease from the said corporation, dated 15th January, A.D. 1849, for the term of twenty-one years, of lots numbers two and three, on the east side of Church Street, in said city, of an annual rental of sixty-two pounds, which said lease deponent was informed and verily believed, contains the usual covenant to pay rent to the said corporation: that the said J. G. Beard, the senior member of the said firm, is, as far as deponent could ascertain and verily believed, also a lessee of the corporation of the City of Toronto, under a lease from said corporation, dated 13th April, A.D. 1863, for the term of twenty-one years, of a water lot to the south-east of the City Hall, on Esplanade Street, in the said city, at an annual rental of \$146, which said lease, deponent was informed and verily believed, contained the usual covenant to pay rent to the said corporation: that the business of the said co-partnership of which the said George T. Beard is a member, is, as deponent was informed and be-

lieved, carried on upon the parcel of land last described: that the said firm of Joshua G. Beard & Sons had, as deponent was informed and verily believed, before and at the time of the said election a contract or contracts with the said corporation for the delivery of a large quantity of coal to the New Gaol in and for the said city, and for the use of the St. Lawrence Hall in said city: that the said George T. Beard received, as the deponent was informed and verily believed, on the 13th of January last, since said election, from said corporation, for and on account of the contract or contracts last mentioned, the sum of \$1,609.09, shewn in books of the said corporation, as follows:—

Coal, &c., for Gaol	\$1,522 84
Coal for St. Lawrence Hall	80 75
Culvert and gratings	5 50
	<hr/>
	\$1,609 09

Joshua G. Beard, the senior member of the firm of "Joshua G. Beard & Sons," in answer, made oath,—That he is the lessee from the corporation of the City of Toronto, of Lots Nos. 2 & 3, on the east side of Church Street, in the said city, under a lease from the said corporation to deponent alone, dated the 15th day of January, 1859, at an annual rental of sixty-two pounds, for the term of forty-two years. That the said firm of Joshua G. Beard & Sons has no interest whatever in the said lease or in the property therein contained; but the same is deponent's own private individual property, unconnected in any way with the said firm or the said partnership business: that deponent holds no lease from the said corporation dated the 13th day of April, 1863, of land to the south-east of the City Hall; but is lessee of the said corporation under a lease from the said corporation to deponent alone, dated the 13th day of April, 1863, for the term of twenty-one years, of a water lot directly south of the said City Hall, at an annual rental of one hundred and fifty-six dollars: that the business of the said firm of Joshua G. Beard & Sons is carried on upon a lot to the east of the said

City Hall, of which deponent is the owner in fee simple, where his coal and wood yard and office are situate, and not upon the said lot contained in the lease last herein mentioned, but a few loads of coal and wood have, by deponent's permission, been landed at the wharf on the said lot: that the said lot of land last mentioned was leased by deponent from the corporation for his own use alone, and without any previous arrangement of any kind with the said firm in connection therewith: that there has never been any agreement, verbal or written, between deponent and the said George T. Beard, or between deponent and any member of the said firm, relating to or in any way connected with the said lot of land last herein mentioned, or the lease thereof: that being in bad health, deponent has been unable to attend regularly to business during the last nine months.

Defendant made oath, that he is a member of the firm of Joshua G. Beard & Sons, carrying on business as wood and coal merchants and stove manufacturers in the said City of Toronto: that during the year 1864, the Corporation of Toronto purchased from the said firm a large quantity of coal for the use of the New Gaol and of the St. Lawrence Hall, in the said City of Toronto: but that as to all, except ten tons of the said coal, there never was any contract or arrangement whatever, either as to the price, quantity, or terms of payment; but the same was ordered by the chairman of the gaol board of the said corporation, without any previous notice to the said firm, and furnished by the said firm as they might have been ordered from and furnished by any other coal merchants in the said city; that as to ten tons of the said coal, tenders for that quantity of coal were advertised for by the said corporation, and the said firm having sent in a tender, the same was accepted, and the said firm furnished the said coal in the month of September last: that no terms of payment were ever agreed upon therefor, nor any contract, verbal or written, entered into with the said corporation relating thereto, except as aforesaid; but the said ten tons, as well as all other coal supplied during the said year one thousand eight hundred and sixty-four, were

supplied before the first day of December last, and were to be paid for on delivery or demand, and were not paid for in full until the thirteenth day of January last, only because payment was not sooner required; that on the said thirteenth day of January, and before deponent was sworn in or had taken his seat as a member of the council, which he did on the sixteenth day of January, the said firm was paid in full for the said coal by the corporation of the year 1864, and he, deponent, had not when he was so sworn in and took his seat, nor had the said firm, any claim whatever against the said corporation on account thereof, nor had any dispute ever arisen between the said firm or deponent and the said corporation relating to the said coal: that the sum of five dollars and fifty cents mentioned in the affidavit of Mr. Hewitt, was a payment for goods ordered by the said corporation from the said firm, in the year 1863, without any contract or agreement whatever, and not paid for before only because such payment was not sooner demanded. The affidavit of defendant was, in all material parts, corroborated by the affidavit of the book-keeper in the employment of Joshua G. Beard & Sons.

Robert A. Harrison, for the relator, contended that the word "contract," as used in the Con. Stat. U. C. cap. 54, sec. 73, should receive a liberal interpretation; that it has been held to extend to leases from the corporation: Reg. ex. rel. Stock v. Davis (3 U. C. L. J. 128); Reg. v. York (2 Q. B. 847); Simpson v. Ready (12 M. & W. 344); The Queen v. Francis (18 Q. B. 526), and to all cases where goods have been supplied to, or work done for the corporation, the price of which is unpaid at the time of the election: Reg. ex. rel. v. Moore v. Miller (11 U. C. R. 465); Reg. ex. rel. Bland v. Figg (6 U. C. L. J. 45); Reg. ex. rel. Davis v. Carruthers (1 Pr. R. 116), and that where goods have been supplied without the price having been agreed upon, there is, if anything, greater reason for holding the case within the act, than if the goods were supplied at fixed prices, for opportunity would otherwise be given to the seller to

procure the acceptance of goods not before accepted, or to procure for them, if accepted, greater prices than their real value(Ib).

C. Robinson, Q.C., argued that no interest on the part of the defendant was shewn in the corporation leases, and that as to the supplies of coal and wood, they were not matters of contract so as to work a disqualification. But admitting the latter to be so, he contended that the disqualification related not to the time of the election, but to the time when the re-lator took his seat; that Reg. ex. rel. Davis v. Carruthers was decided under Stat. 16 Vic., cap. 181, which enacted that “no person having, by himself or partners, any interest or share in any contract with or on behalf of the township, county, village, town, or city in which he shall reside, shall be qualified to be, or be elected, alderman or councillor for the same in any ward therein,” whereas the present Act simply provides that no person having, by himself or his partners, an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of a corporation (sec. 73). He urged that no person elected becomes a member of the council till acceptance of office (sec. 130); and that when defendant accepted office, his disqualification had been removed.

Robert A. Harrison, in reply, pointed out, that by sec. 7, of the Act, the persons qualified to be elected mayors, members of a council, &c., are such residents, &c., as are not disqualified under the Act, and have at the time of the election the requisite property qualification; that there could be no qualification at the time of the election if there were then an existing disqualification, and that an interest in a contract is by the Act expressly declared a disqualification; that by the election the party elected became a member of the council in poss if not in esse; and that reading sec. 73 of the Act by itself, the words “member of the council,” were not to receive the narrow construction for which the defendant contended, but rather a broad and liberal construction, in unison with the object and spirit of the law, which is to secure indepen-

dent, honest, and impartial men for the situations of public trust created by the Act. See *Powell v. Bradley* (11 L. T. N. S. 602).

HAGARTY, J.—This is a summons in the nature of a quo warranto, calling on George T. Beard to shew by what authority he claims the office of councilman for the ward of St. James, Toronto. The election was held on the 2nd and 3rd of January, and Mr. Beard was then elected. The objection is wholly to his qualification, viz., that before and at the time of election he had, by himself or his partners or partner, an interest in a contract with the city corporation. It is sworn on the part of the relator, that Beard is a member of the firm of J. G. Beard & Sons; that the senior partner, J. G. Beard, is a corporation lessee of land on which the partnership business was carried on. In reply, it is sworn that the partnership, as such, had no interest whatever in the leasehold premises; that only a small portion of the premises was occasionally used for landing coal and wood, the business being actually conducted in other premises, and that the defendant Beard had no interest in the lease, and no agreement existed with the lessee respecting the same or the rents or covenants.

No doubt a corporation lessee is disqualified, but nothing appears to me in this case in any way to connect defendant with any obligation, interest, or contract under the lease, and this objection, I think, wholly fails.

The remaining one is more serious. It appears that defendant's firm dealt in coal and wood, and during the year 1864 supplied large quantities of both coal and wood to the corporation, as defendant swears, without any arrangement as to price or terms of payment; and in the ordinary course of business, for a small portion, viz., ten tons, a tender by defendant's firm had been accepted. No written or other contract, except the contract implied by the relation of vendor and purchaser, existed. All the coal was supplied before the 1st of December, and was to be paid for on delivery or demand, and was not paid for in full until the 13th day

of January, 1865, only because payment was not sooner required. Defendant swears that on that day, being after his election but before he had taken his seat, the unpaid balance was paid by the corporation in full. It would seem that the payments made to defendant's firm, in January, amounted to over \$1,600.

I think I am bound to hold that a claim against the corporation for the price of goods sold, work and labour, &c., comes clearly within the words of the statute disqualifying any person having, by himself or his partners or partner, an interest in any contract with or on behalf of the corporation. I think this point has been expressly decided before now. The case of Carruthers (1 Pr. R. 116), which was for work done, is hardly distinguishable. I do not, however, see how there can be any doubt on this question. The object of the act was to keep from the council board any person having any interest in procuring the corporation funds to be applied in satisfying any claims he might have against them for payment. The vendor of goods, as a general rule, has a marked interest in obtaining prompt payment, &c., and very many cases arise in which it is all-important to the public interest that perfectly unbiassed councillors should decide on the amount when the price is not fixed, on the acceptance or rejection of inferior goods or imperfect workmanship, or on claims for services of doubtful existence or utility.

The word "contract" is of wide significance, and I think clearly embraces a case like the present. But Mr. Robinson, for the defendant, argues with much force and ingenuity, that even if the defendant were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council, viz., on the 13th of January, a day prior to the earliest lawful assembling of the new council. He points out that, in the earlier acts, the words are, that "no disqualified person shall be elected," &c. The last act governing this case is Con. Stat. U. C. cap. 54, sec. 73, which differs from the preceding acts, that no disqualified person "shall be qualified to be a member of the council of the corporation;" and the argument is, that this

points not to the time of the election, but to becoming a member, or, in other words, taking a seat in the new council. And Mr. Robinson urges here, that Mr. Beard wholly ceases to be a contractor, or to have any claims, before the new council had any legal right to meet or act as such. But the last statute says, in sec. 70, "the persons qualified to be elected mayors, members, &c., are such residents of the county within which, &c., as are not disqualified under this act, and have, at the time of their election, property," &c. Then, the disqualifying clause, sec. 73, declares, amongst other disqualifying causes, "that no person having, by himself or his partners, any interest in any contract, &c., shall be qualified to be a member." First, we have a declaration that the persons qualified to be elected are those not disqualified under the act. Next, we have a list of the disqualifications which prevent persons becoming members of the council. I feel, no doubt whatever, that it is at the time of the election that the qualification or disqualification of the candidate are to be considered. He is then either a qualified or disqualified person for the suffrages of the electors. I should hold the same opinion if I had nothing but the 73rd section to guide me. To refer the qualification to the time when the person elected might actually take his seat at the council board, would be, in my judgment, wholly at variance with the spirit of the Act of Parliament, and fatal to the usefulness of this very wholesome provision as to disqualifications.

In the present case we may possibly regret the result from a conviction of the apparent good faith of the whole proceeding. We may be satisfied that the disqualification was wholly accidental, and that Mr. Beard might as readily have settled with the corporation and removed all objections before the election as after. But the rule must not be infringed; the election must be set aside, and a new election had.

I unwillingly feel compelled to make defendant pay costs. But I think I cannot weaken the effect of this wholesome provision by discouraging parties from bringing a case of disqualification under notice, at the peril of having to lose

the costs necessarily incurred. The defendant might have disclaimed, and saved further expenses. He must be unseated with costs.

Order accordingly.

GORDON & MCKAY v. ROBINSON.

Pleading—Plea of puis dar. con.—C. L. P. Act, sec. 98—Necessity for affidavit—Service of affidavit with such plea—Plea of puis dar. con. after demurrer and other issues to be tried.

To a fourth plea to the first and second counts of a declaration the plaintiffs demurred, upon which judgment was given for the plaintiffs on the demurrer. The plaintiffs also traversed the plea, on which issue was taken. Defendant subsequently pleaded *puis dar. con.* to same counts. On application to set aside this latter plea:

- Held*, 1. That under sec. 98 of C. L. P. Act, a copy of the affidavit filed with a plea of *puis dar. con.* or the order dispensing with such affidavit, must be served with the copy of the plea served.
2. That a plea of *puis dar. con.* may be pleaded after demurrer filed, or even after judgment on the demurrer, so long as there are other issues remaining on the record for trial—certainly so when the judgment did not relate to the remaining issue.
3. But that the plea of *puis dar. con.* must be set aside, because the fourth plea (which was to the same counts) and the issue in fact joined upon it, and the judgment against it could not be got rid of by, in effect, substituting another plea for it, and thus amending or pleading double without leave.

[CHAMBERS, January 11, 1864.]

This was an application to set aside a plea, *puis darrein continuance*.

The facts of this case were, that these plaintiffs sued the defendant for failure to deliver as good a quality of cloth to the plaintiffs as he had agreed to manufacture for them; to which defendant set up in defence that before then the defendant had brought an action against the plaintiffs for the price of this cloth, in which action the now plaintiffs, as defendants, paid so much money into Court, and pleaded never indebted to the residue of the demand: that at the trial the now plaintiffs gave evidence as to the alleged inferiority of the cloth, and so attempted to get a reduction from the full amount of the sum claimed, and the jury, upon hearing all the evidence, found a verdict in favour of the now defendant, then the plaintiff in that action; and the defendant

alleged that the now plaintiffs should not be permitted to maintain their present action, which was for and in respect of the same matters which they set up as a defence in the former action brought against them.

To this plea the plaintiffs demurred, because it was not averred that the now defendant had obtained judgment against the now plaintiffs for the amount of his recovery; and, after argument, the Court of Common Pleas gave judgment on demurrer for the plaintiffs, with leave to defendant to apply to amend to a Judge in Chambers, or to the full Court before the fourth day of the ensuing term.

The reason why judgment was not entered in the former cause was, that after the said plaintiff's rule nisi for a new trial in that case was discharged, they appealed against the judgment of the Court in so discharging the rule, in consequence of which the now defendant was prevented from entering up his judgment; and the defendant alleged that this appeal had been brought to tie up his proceedings, and to enable the plaintiffs to carry on their present action at a time when, by reason of his proceedings being so tied up, he could not set up the fact of his former recovery in bar to this action of the plaintiffs. The defendant, however, on some ground which did not appear, signed judgment in the previous action, and now pleaded this final recovery in the plea in question, in the nature of a pleading *puis darrein continuance*.

The plea was filed, with an affidavit accompanying it, in the proper office, and a copy of the plea was also served on the plaintiff's attorney, but this copy was not accompanied by any affidavit or copy of affidavit similar to the one which accompanied the plea that was filed.

The pleadings were as follows:

There were three counts in the declaration.

The first plea was to the whole, that defendant did not undertake as alleged.

The second plea was to the first count.

The third plea was to the second count.

The fourth plea was to the first and second counts.

The fifth plea was to the third count.

The plaintiffs took issue on the 1st, 2nd, 3rd, and 5th pleas.

The plaintiffs traversed the 4th plea, upon which defendant joined issue, and the plaintiffs also demurred to the 4th plea; upon which defendant joined in demurrer.

The plaintiffs obtained a summons calling on defendant to shew cause why the plea in the nature of a plea puis darrein continuance, pleaded by the defendant on or about the 25th of November last, should not be set aside with costs, on the following grounds:

1. That it was pleaded to the cause of action in the first and second counts of the declaration, after judgment on demurrer had been given in favour of the plaintiffs in respect of the same.

2. That another plea to the residue of the cause of action in the declaration still stood upon the record.

3. That the present plea had been pleaded after the time when by the practice it could have been pleaded, unless with the leave of the Court or a Judge, and there was no such leave.

4. That there was no affidavit or copy of affidavit in verification of the plea annexed to or served with a copy of the plea which was served on the plaintiffs' attorney.

5. That it was pleaded so as to embarrass the plaintiffs, because there was a replication to the fourth plea, which the plea puis darrein continuance professed to waive, still undisposed of on the record.

6. That the defendant is attempting by this plea to deprive the plaintiffs of the costs of the demurrer on which they have obtained judgment, and which should have been paid to the plaintiffs before the defendant filed any other plea.

7. That the defendant had leave to apply to amend his pleading demurred to, and he has not done so, and he should not be allowed to amend indirectly by means of this present plea, without leave, and without payment of costs.

The plaintiffs also asked leave to sign judgment upon the demurrer if such plea should be set aside, or to have proceedings stayed, until their rule in the Practice Court for

setting aside the judgment in the cause of the said Robinson, as plaintiff, and the said Gordon & McKay, as defendant, should be determined.

John B. Read shewed cause. The affidavit, if filed, need not be also served: *Todd v. Emly* (9 M. & W. 606): C. L. P. Acts. 98. This plea could be pleaded after a demurrer; *Wagner v. Imbrie* (6 Exch. 380), *Solomon v. Graham* (5 E. & B. 309), *Dunn v. Hill* (11 M. & W. 470), and the case in *Moore* 871, must be considered as over-ruled.

The plea also may still be pleaded, though judgment has been pronounced in favour of the plaintiffs on the demurrer: because until damages has been assessed the judgment is not final. *Wagner v. Imbrie*, ante; *Lovell v. Eastaff* (3 T. R. 554); *Dickson v. Ward* (2 E. & A. 275).

The plaintiffs cannot be deprived of their costs by this proceeding: *Goodwin v. Cremer* (18 Q. B. 757); *Rule* 23 T. T. 1856; *Arch. Pr.* 11 Ed. 910; *Barnett v. London and N. W. R. W. Co.* (5 H. & N. 604).

The defendant may be allowed to plead this plea even after the regular time, if he have been guilty of no culpable neglect, and no injury can happen to it by the plaintiff; *Dunn v. Loftus* (8 C. B. 76).

The defendant was at liberty so to plead instead of accepting the leave to apply to the Court to amend, for the right to plead was independent of any act of the Court: *Bryant v. Perring* (5 Bing. 414); *Whitmore v. Bantock* (1 M. & M. 122); *Paris v. Salkheld* (2 Wils. 139).

J. A. Boyd for the plaintiffs.—This plea is classed with dilatory pleas, and all such pleas must be accompanied with an affidavit of their truth, and the C. L. P. Act requires this plea to be accompanied by an affidavit, which must mean in service, as well as in filing: *Page v. Shennstone* (10 Jur. 1009).

The plea, too, is not pleadable by the Act without the leave of the Court being first granted for this purpose.

The plea should not be allowed now, for it operates as a retraxit of the demurrer, and this cannot properly be when

Judgment has been given upon the demurrer by the Court. (5 E. & B. 306), and see *Commercial Bank v. Jarvis*, (6 O. S. 320). If pleadable at all after demurrer, it cannot be so pleaded after judgment upon the demurrer: Lush's *Prac.* p. 335; *Fox v. Tilly* (6 Mod. 225), because, as in a judgment by default the parties have no longer a day in Court: *Shaw v. Shaw* (6 O. S. 458); and at all events, it would be pleading double without leave.

A. Wislon, J.—It is objected that an affidavit or copy of affidavit should have been served along with the plea which was served. This point of practice turns upon the 98th sec. of C. L. P. Act, which provides that, "In cases in which a plea puis darrein continuance was formerly pleadable in banc or nisi prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading; but unless the Court or a Judge otherwise orders, such plea shall not be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of the plea."

As I read this section, it means this: that the defendant may file this plea of his own motion with this affidavit, if he can make it without the leave of a Judge; but if he cannot make an affidavit, then he shall not file it without first getting the leave of a Judge to do so. And the reason for it is quite obvious—there was no inflexible rule of law that such a plea must have been pleaded within eight days after the subject of it arose; and there might frequently have been circumstances which excused the defendant from not pleading his defence within that stated period. Whenever such a case arose, the Court or a Judge would order the plea to be allowed without an affidavit, because the usual rule could not be made: *Dunn v. Loftus* (8 C. B. 76); *Willoughby v. Wilkins* (2 Smith 398).

I do not think it means that no such plea shall be allowed unless the leave of the Court or a Judge have been first given, for it is the defendants right to plead such a plea, the same as any other defence he may have

without the leave of any one. It was such an argument as this that raised the ire of the Chief Justice in 2 Wils. 138, when he said: "that such discretion was contrary to the genius of the Common Law of England, and would be more fit for an eastern monarchy than this land of liberty;" which he vouched for by a quotation from the great charter, and which Lord Kenyon, in 3 T. R. 557, called "language particularly forcible."

I cannot say clearly whether such an order has been made or not, for the case has not been so argued before me, the only objection being that no affidavit has been served. I must therefore assume that both parties have put themselves upon this issue.

In Arch. Pr. 11th ed. 909, it is said "If pleaded in banc the plea is delivered to the plaintiff's attorney or agent accompanied with the required affidavit," referring to *Wilmington v. Wilkins* (2 Smith 398); *Prince v. Nicholson* (5 Taunt. 333). Again, "When pleaded at nisi prius, it should be delivered to the Judge," referring to *Payne v. Shenstone* (4 D. & L. 396). The practice in this country as to service of pleadings is prescribed by rule 132 of T. T. 1855: a copy of every declaration and subsequent pleading shall be served upon the opposite party, and by the 61st section of the C. L. P. Act, which is to the same effect.

Then the 77th, 83rd and 118th sections of the C. L. P. Act assume and provide as necessary, that declarations and all subsequent pleadings shall be filed and served.

Now, as the copy served must be a copy of the pleading filed, I think if the copy filed be receivable only by virtue of an affidavit, that a copy of that affidavit ought to go along with the plea which is served. Suppose, instead of this affidavit, the Judge had made an order allowing the plea; why should not the order be served along with the plea, as well as an order to plead several matters, when such an order is made? And it is the invariable practice to serve this latter order either with the pleas or before them. I can see no difference between the one order and the other, and if the order should be served I do not see

why the affidavit should not be served, when the defendant makes use of an affidavit instead of an order.

The plaintiff ought to be apprised formally of the course which the defendant is adopting, and of the power which he has to take such course, but without service of the order or affidavit, either before or with the plea, he cannot tell whether the defendant is relying on an order or an affidavit, or on either of them. And this I think he has the right to be informed of. I do not think I can do more than set aside the service of this plea and require the defendant to serve the plea afresh, with a copy of the affidavit which has accompanied the original plea filed.

As to its being pleaded after demurrer filed, I think that to be no objection in the abstract, upon the later authorities, particularly the case in 6 Exch. 380, and it would seem to be no objection even to plead it after judgment had been pronounced on the demurrer, so long as there are other issues still remaining upon the record for trial. This is certainly so, when the judgment of the Court does not relate to the issue yet to be tried, as when the defendant pleaded to a recognizance of bail (1), nul tiel record; (2), no ca. sa. issued; (3), payment; and upon issue joined, plaintiff had judgment on the first two issues, leaving the third one yet to be tried. It was held that the defendant could plead *puis darrein continuance* to this 3rd issue. Parke, B., said: "I do not see why the plea (*puis darrein continuance*) may not operate as a waiver of all pleas which remain to be tried. I do not know what there is in principle to prevent a defendant from withdrawing the pleas which remain to be tried, and substituting a plea *puis darrein continuance*;" *Wagner v. Imbrie* (6 Exch. 380).

The defendant contends he is at liberty to plead the present plea, which is to the first and second counts of the declaration, in lieu of all the pleas to these counts yet remaining to be tried, although he cannot waive the fourth plea to these counts, because of the plaintiffs having obtained judgment on that plea while the plaintiffs insist that if this plea be pleaded to these counts with the present fourth plea still being upon the record, and which must remain there as the

defendant cannot waive the plaintiff's judgment, or the plaintiffs' replication to it, and which he is entitled to try so long as the plea itself stands, the defendant will be pleading double without the leave of the Court or a Judge, and will be pleading *puis darrein continuance*, while one of the former issues in fact yet to be tried is remaining on the record.

If this fourth-plea were the only one upon the record the defendant could not after judgment on demurrer plead *puis darrein continuance*. But I cannot see how the defendant, who cannot waive his fourth plea because of the issue in fact still to be tried upon it, and the judgment against it, can substitute the present one for it.

I cannot see, either, why the defendant should have adopted this course, by which he was willing to abandon all his other pleas to these counts instead of amending, as he might have done, which would have been much simpler, and as I think more beneficial to him, by preserving to him the pleas which he has been willing to give up, and by which he has occasioned a good deal of trouble and difficulty, which might thus have been avoided.

I think, therefore, this plea cannot be pleaded, because the fourth plea and the issue in fact joined upon it cannot be got rid of by the defendant, as the record stands at present, with the judgment on demurrer on it in favour of the plaintiffs. I should therefore, if acting upon my own judgment and opinion, make the order setting aside the plea, but upon talking the matter over, though not very fully, with the Chief Justice of the Common Pleas, and my brother Hagarty, they were of the opinion the plea should be permitted to stand and the plaintiff be left to bring the matter before the full Court, as he should be advised; and this, therefore, is the course which I will take.*

The summons then will be discharged, the costs to be costs in the cause, but the defendant will be allowed to reserve his plea with the copy of the affidavit of the truth of the plea which is now annexed to the plea filed.

* The matter was not brought before the Court, as a compromise was effected, the defendant paying costs of demurrer and of this application, and the plaintiffs consenting to the plea remaining on the record.—**REP.**

MOOR V. BOYD ET AL.

*Change of venue—Principles which guide the Court in applications for
—Special grounds.*

The plaintiff is *dominus litis* and entitled to lay the venue where he pleases subject to the rules of the Court.

The Court will not deprive the plaintiff of this right unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to be changed.

If it be made to appear that there will be a great waste of costs in a trial where the venue is laid, and much saving of costs in trying it at the place to which it is sought to change the venue, the Judge is at liberty to exercise his discretion in the matter, and to make the order if he sees fit.

In this case the Judge was not satisfied that there would be such waste of costs, and on that ground he declined to change the venue.

The suggestion that the defendants could not obtain a fair and impartial trial in the county was not made out to his satisfaction, and on that ground also, as well as others mentioned in the case, he refused to interfere.

[CHAMBERS, March 28, 1865.]

Burns obtained a summons to change the venue from the County of Stormont to the County of the City of Toronto, on the ground that the cause of action arose in the City of Toronto, and the defendants' witnesses reside at or near there, and of the great additional expenses of a trial at Cornwall, and the inability of the defendants to get a fair and impartial trial there, or to get a jury of tobacco manufacturers, or merchants; and why the cause should not be tried by a special jury of tobacco manufacturers, or merchants, or others skilled in the manufacture and quality of tobacco; and why for that purpose a writ of *venire facias* should not issue directed to the Sheriff of the United Counties of York and Peel, if the venue be so changed, or if not to the Sheriff of the United Counties of Stormont, Dundas, and Glengarry.

The affidavit of the defendant Arthurs was filed on moving the summons.

He stated that the cause of action, if any, arose in the City of Toronto and not in the County of Stormont; that the defendants had a good defence on the merits; that it would be necessary for defendants to subpoena not less than between twenty and thirty witnesses to support their defence; that they were material and necessary for that purpose; that the defendants intended to subpoena them; that

the witnesses all resided in Toronto and Hamilton, and in the neighbourhood of those cities, except two who resided in Cobourg and Whitby respectively, and that none of them resided in Stormont; that all plaintiff's witnesses, as he believed, resided in Montreal, where their evidence could be taken under a commission; that expense of subpoenaing and procuring the attendance of the witnesses at the trial at Cornwall would be at least \$220 more than if the trial took place at Toronto; that a former action in relation to this claim was tried at Cornwall at the Fall Assizes of 1863; that deponent was present thereat for several days; that from what he had seen of the town and the jury, and the influence brought to bear on them by plaintiff, especially through some of the witnesses boarding at the same tavern, where numbers of the jurors stopped, in circulating tobacco amongst them, as he was informed, and prejudicing their minds against the defendants, he verily believed the defendants could not and would not get a fair and impartial trial at Cornwall; that from the magnitude of the amount in dispute of the former trial, and the number of witnesses on both sides (being about forty) the cause was universally known and talked about in a small place like Cornwall; that the deponent was told and believed a prejudice was endeavoured to be got up by or on behalf of the plaintiff against the defendants, by it being represented that the reason defendants refused to receive the tobacco was on account of the fall in the price of tobacco and not because of its being a bad and not equal to the Union Jack brand (which it was to be); that the same would occur again in this cause he verily believed; that the Hon. J. Sandfield Macdonald was the plaintiff's counsel on the former trial, and is the plaintiff's attorney, and would, as deponent believed, be his counsel on the coming trial; that his influence in Cornwall and in the United Counties of Stormont, Dundas, and Glengarry, both on his own account and his long residence therein, and being a member of Parliament for Cornwall, or some of the counties aforesaid now and for so long before, and also speaking the Gaelic language, which most of any jury to be

got in said counties to speak, is so great that the deponent verily believed it to be utterly impossible on that account alone for the defendants to get a fair and impartial trial at Cornwall; that his influence is so great that it is almost a proverb that no stranger not living in said counties when he is opposed to him can get a verdict there, even though entitled to it; that if the trial of this cause takes place there the deponent believed the defendants were certain to lose the verdict, whereas they are entitled to a verdict; that he, deponent, believed the case could only satisfactorily be tried by a jury of tobacco manufacturers, or of those engaged in the manufacture of tobacco, or in the buying or selling thereof, as such a jury could only rightly understand the questions involved in the cause, and give a proper decision therein, and justly weigh and decide on the evidence; that such a jury could not be got in the united counties, as the deponent was advised and believed, but could be got in Toronto; that from the foregoing and other causes the deponent believed a fair and impartial trial could not be had in Cornwall; that the application is not made for purposes of delay, but to save additional expenses and get a fair trial; that from the number of witnesses in the cause and persons attending court at the former trial, he, deponent, and a number of the defendants' witnesses, could only get accommodation at a private house, and that of an inferior sort.

The affidavits of six other persons, who were probably witnesses for the defendants on the former trial, were also filed. They used almost the identical words of Mr. Arthurs, stating their opinion that the defendants could not get a fair trial in Cornwall for the following reasons:

1. The influence brought to bear on the jury by plaintiff through some of his witnesses boarding at the same tavern where four of the jurors at the former trial boarded, in prejudicing their minds.

2. The case being known and talked about in a small place creating a prejudice, by representations that defendants refused to receive the tobacco because of the fall in the price of the article.

3. The influence of Hon. J. S. Macdonald, and his speaking Gaelic, rendered it impossible for a stranger to get a verdict when he is on the other side.

The case can only be satisfactorily tried by a jury of tobacco manufacturers or of those engaged in the manufacture of tobacco, or the buying and selling thereof; and such a jury could not be had in Cornwall, but can in Toronto.

A further affidavit by William Murray, of the City of Toronto, wholesale grocer, was also filed by the defendants. In his affidavit the first and third grounds mentioned in the other affidavits as above mentioned were struck out.

W. S. Smith shewed cause. He filed, on behalf of the plaintiff.

1. The affidavit of the plaintiff, stating that the town of Cornwall is the nearest place in which the assizes are held to the city of Montreal, where all his witnesses reside; that he would require and have in attendance at court on the trial of the cause about forty witnesses to testify to the quality of the tobacco; that the witnesses are persons who were in his employ when the tobacco was being manufactured, and also merchants and tobacco dealers in the city of Montreal to whom he sold the same quality and brand of tobacco as that sold to defendants; that it would be necessary for his witnesses in giving evidence to see the tobacco that would be produced at the trial in order to speak of its quality; that the additional expense of having the case tried at Toronto instead of Cornwall would be \$600, and that great additional expense would be incurred in trying this cause at any assize town further from Montreal than Cornwall.

2. The affidavit of John B. McLennan, the partner of the attorney for the plaintiff, who stated that he had resided in Cornwall for ten years, attended nearly all the assizes in that town during that time; that he was not aware nor did he believe that defendant Arthurs, or the other defendants whose affidavits were filed on this application by defendants, ever attended an assize in the said town either as witnesses, or plaintiffs, or defendants, ex-

cept in the cause against the defendants, tried in November, 1863, and that was the only opportunity they ever had of judging of jurors in the United Counties of Stormont, Dundas, and Glengarry.

RICHARDS, C. J. C. P.—The present Mr. Justice Willes, when at the bar, stated, *arguendo*, in *DeRothschild v. Shilston* (8 Ex. 503), “The plaintiff is the *dominus litis* and entitled to lay the venue where he pleases, subject to the rules of court.”

In giving judgment, Pollock, C. B., said, “The general rule on the subject may be thus stated; the application to change the venue may be made either before or after issue joined, as may be most convenient to the parties in the proper conduct of the cause. If the application be made before issue joined, it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause shewn. It will be sufficient however, for him to rely on the fact, that the whole cause of action arose in the county to which he desires to change the venue; but if he does so he may be answered by any affidavits negating this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined, the affidavits in support of the application must shew that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course these affidavits are open to an answer by the other party. In all these cases the Court or Judge will decide, after hearing both sides, whether the venue is to remain or be changed as prayed, or be laid in some third county, according to its discretion.”

In *Helliwell v. Hobson et al.* (3 C. B. N. S. 761), the head-note of the case is, “The Court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue.”

In *Durie v. Hopwood* (7 C. B. N. S. 835), the head-note

reads, "The Court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there be some great and obvious preponderance of convenience in trying the cause elsewhere.

"Therefore in an action for the breach of a warranty on a sale of horses at Liverpool, the Court refused to change the venue from Middlesex to South Lancashire, upon affidavit stating that the defendant's witnesses all resided at Liverpool and in Ireland—the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid."

In giving judgment in this case Willes, J., referred to *Helliwell v. Hobson*, and intimated that when the question decided in that case arose again it would require further consideration.

In *Jackson v. Kidd* (8 C. B. N. S. 354), Byles, J., said, "To induce a Judge to make such an order" (to change the venue) "three things are necessary: First, that the defendant's witnesses reside at the place to which it is sought to change the venue; Secondly, that the plaintiff's witnesses also reside there; Thirdly, that the cause of action arose there." Erle, C.J., in giving judgment, said, "The principle by which the Judges have been guided since the passing of the Common Law Procedure Act, 1852, is this—that if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place to which it is sought to change the venue, the Judge is at full liberty to exercise his discretion in the matter, and to make the order if he sees fit."

Schuster et al. v. Wheelwright (8 C. B. N. S. 383), was an action brought against the captain of a vessel for conversion of a bag of specie. The vessel was burnt at sea. Two bags of specie had been shipped on board of her, and the specie being taken on board another vessel at sea, it was agreed between the captain of the burned vessel and the salvor that it should be referred to a gentleman at Liverpool to say what should be awarded for salvage. He awarded to

the salvor one of the bags. In an action against the captain the venue was laid in London. On application to Crompton, J., at Chambers, he ordered the venue to be changed to Liverpool, on an affidavit that the plaintiff's cause of action, if any, did not arise in London or Middlesex, that it would be absolutely necessary for the proper defence of the action to adduce the evidence of several witnesses, some of whom resided at Whitehaven in Cumberland, and others near Queenstown in Ireland; that it would be attended with great and needless expense and loss of time of such witnesses attending the trial if tried in London; that the trial at Liverpool would be at considerably less cost, as it could be reached by steamer both from Queenstown and Whitehaven; and that the trial being of a mercantile character it would be conducive to a fair trial to hold the same in Liverpool.

The Court was moved to rescind the order, on the ground that the affidavit did not warrant the change of venue. Byles, J., on the argument, said, "There certainly is no reason that I can see why the cause should not be tried at Liverpool rather than in London." The plaintiff's counsel contended that "a plaintiff has a right to lay the venue where he pleases, and the Court will not interfere to deprive him of that right unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue." Erle, C. J., said, "Where a Judge has exercised a discretion in the matter, the party seeking to impugn it should shew the Court some clear reason for thinking that it had not been well exercised."

The plaintiff's affidavit shewed that he had several witnesses who resided in London, and the removal of the cause to Liverpool would entail upon the plaintiff the necessity of employing fresh counsel. It was manifest, therefore, that convenience, so far as the plaintiff was concerned, greatly preponderated in favour of having the cause tried in London.

Erle, C. J., in giving the judgment of the Court, said, "Without saying what would have been my opinion if this had been an original motion to change the venue, I think the

learned judge having in the exercise of his discretion made the order, the burthen of shewing that he has acted under a misconception is cast upon the plaintiff. He has failed to do this, and therefore I think his rule must be discharged."

I shall consider the change of the venue in relation to the question of the expense of trying the cause in Toronto instead of in Cornwall. The plaintiff expects to have in attendance about forty witnesses, all of them residing in Montreal, about five hours run by rail from Cornwall, a distance of sixty-seven miles. The defendants state that they have between twenty and thirty witnesses residing in Toronto and the neighbourhood, distant 266 miles from Cornwall. If the plaintiff's forty witnesses were obliged to come from Montreal to Toronto they would require to travel 333 miles. The defendants say their additional expenses in trying at Cornwall would be about \$220. Plaintiff says his additional expense in trying the case at Toronto would be upwards of \$600. As to expense then it seems largely in favour of allowing the venue to remain where it is. It is suggested, however, that the plaintiff's witnesses may be examined under a commission and the expenses thus be saved. I think, however, in a case like this, when the question is as to the quality of a manufactured article, the evidence taken on a commission would not be satisfactory. It would not be accompanied by that immediate reference to the samples to be compared, and ready explanations that might be given by a *viva-voce* examination. I think the plaintiff not unreasonable in saying it would not be safe for him to rely on testimony taken under a commission.

The next argument as to convenience is, that it will be necessary to have a view of the tobacco disposed of to defendants, and that cannot be had at Cornwall, as it is now in defendants' warehouse here. I apprehend that enough of the article for all practical purposes on the trial can be forwarded to Cornwall at small cost. It is not in the nature of a fixture, and can readily be forwarded to Cornwall, the whole of it if necessary, I should suppose, without increasing the expense so as to make it range up to the difference of

cost suggested by the plaintiff that would occur in trying the case at Toronto.

The next point of convenience is that so large an influx of people takes place in Cornwall during the sittings of the Superior Courts that the additional accommodation required for defendants and the witnesses cannot be obtained there. I should think this difficulty might be obviated by an early application to the innkeepers, and if a special jury is struck the Court would probably fix to day for the trial of the cause, so that it would not be necessary to bring the witnesses there before that day. I cannot say that I feel pressed with this argument.

In *Hawthorne v. Denham* (3 Irish Law Rep. 1), the Court refused to change the venue to enable the parties to obtain a venue where a much stronger case was made than in this cause.

As to this contention then, that, as the cause of action arose here and defendants' witnesses reside here, the cause can be more conveniently tried at Toronto, I am against the defendants, for I think that as the plaintiff had a much larger number of witnesses residing in Montreal, from whence, if a day is fixed for the trial, they may be brought in four or five hours, the balance of convenience and expense is much in favor of not changing the venue.

The remaining question, as to getting a fair trial at Cornwall, still remains to be considered.

The first objection is, that plaintiff's witnesses and others converse in presence of the jurors on the subject in dispute, and inculcate the erroneous notion that defendants refused to take the tobacco that the plaintiff manufactured for them because the price of the article had fallen, and not because of its bad quality. As to this ground, I suppose, if these witnesses were unscrupulous enough to do this in Cornwall they might do so in Toronto; and it further presumes that which I am unwilling to admit without clear evidence of the fact, that intelligent jurors would allow themselves to be influenced by such considerations as these. It will hardly be urged that this objection will apply to a special jury which the defendants now seek to have struck.

The next is, that the plaintiff's counsel and attorney is a member of Parliament representing one of the constituencies in those united counties, and that he has done so for many years past; and that in addition thereto he speaks the Gaelic language, which is the mother tongue of many of the jurors, and therefore the jury will give a verdict to his client when it really ought to be given for the defendants.

I have not met with any case at all approaching this as a ground for changing a venue. I find, when an action was brought against the managers of a bank, it was urged that there were a great many stockholders of the bank scattered through the country to which it was sought to change the venue, and that many of the leading inhabitants transacted their business with the bank, and in that way there might be a prejudice in favour of the defendants themselves. I have never heard it urged that because an advocate had great influence with the jurors that was a ground for changing the venue. If so, I apprehend, when Sir James Scarlett was at the bar and retained against a defendant it might have been urged that his influence with the jury on particular circuits was so great that the defendant could not get justice done him, and therefore he ought to have a change of the venue. I have not met any case in which the application has ever been made on such a ground. If the defendants puts their case before a jury and justice is not done them, the Court always have the corrective power of granting a new trial to secure the ends of justice.

If the case be one requiring a larger amount of intelligence and a more careful selection than is usually possessed by a common jury, the defendants may obtain a special jury: and I am unwilling, without the clearest possible evidence to justify it, to cast such a reproach on the integrity and intelligence of the inhabitants of the United Counties of Stormont, Dundas, and Glengarry, as to suppose they cannot try a case in which Mr. J. S. Macdonald is an advocate, and do justice to the party to whom he is opposed. The language of some of the Judges in *Dowling v. Sadlier* (3 Ir. C. L. Rep., at pp. 606 and 608), seem to me appropriate to this case:

Chief Justice Lefroy said, "Because it is suggested that a feeling existed * * * is that to me made the ground for the civil excommunication of the special jury of the whole county? * * * Ought the country to be stigmatized upon any such allegation?" The learned Chief Justice refers to the language of Mr. Justice Wilmut in *Rex v. Harris* (3 Burr. 1330), where he said, "It is only supposed, 'conjectured,' they verily believe that there cannot be a fair and impartial trial by a jury of the city. Nor in the nature of the thing, can such a suggestion be credited. It does not follow that because a man voted on one side or on the other, he would therefore perjure himself to favour that party when sworn upon by a jury." Moore, J., in the same case said, "It would at all times require a very strong and clear case to induce me to say that a fair trial could not be had in any county in Ireland. I would be slow to say that if a man were interested in a matter of a political and exciting description he would therefore neglect his duty.

As to striking a special jury of tobacco manufacturers from those who are not witnesses in the cause, I fancy that would be almost as difficult in Toronto as in Cornwall. Then if the qualification be extended to those who deal in the article of tobacco by buying and selling, I think there is hardly a general dealer in the United Counties of Stormont, Dundas, and Glengarry, who does not buy and sell tobacco more or less.

On the whole I do not see my way clear to changing the venue as desired by the defendants, and that part of the summons will be discharged with costs to plaintiff to be costs in the cause.

As to the other branch of the summons I do not understand that it is opposed, and therefore the order will go as to that.

I may mention, that I understand Mr. Justice Hagarty, when applied to in Chambers, refused to grant the summons to change the venue on the grounds stated in the defendants' affidavits.

I have looked at many more cases than those I have

quoted from, but I thought it better to refer to those of the latest date, containing the views of the Judges on this question of venue, so far as necessary to be considered in settling the questions presented on this summons.

Order accordingly.*

IN RE W. L. SMART, Judgment Creditor, D. G. MILLER, Judgment Debtor, and ANDREW ROSS; Sheriff of the County of Oxford, Garnishee.

Attachment of debts—Assignment of judgment—Money in hands of Sheriff attachable—Debt due to two parties—Setting-off judgments.

- Held*, 1. That the assignee of a judgment creditor can proceed in the name of the latter to attach a debt.
2. That money made by Sheriff under an execution is attachable in his hands for the debt of the person for whom he made the money.
3. That a debt owing to two cannot be attached to satisfy the claim of a creditor against only one of those two.
4. Under the circumstances of this case the set-off of a judgment was refused.

[CHAMBERS, March 16th, 1866.]

A summons was granted in this case on the 26th September last, calling on the judgment debtor and garnishee to shew cause why the garnishee should not pay to the judgment creditor the debt due by the garnishee to the judgment debtor. It was enlarged from time to time until now.

On the 15th December last Miller obtained a summons on Smart & Beard to shew cause why judgments hereinafter mentioned, recovered in the name of Cottle against Smart, should not be set off against Smart's judgment. Both summons came on together for argument.

The facts were, that Smart recovered a judgment against Miller on or about the 15th November, 1861, for £155 11s. 9d. damages, and £14 19s. 1d. costs, which was subse-

* See also *Channon v. Parkhouse* (13 C. B. N. S. 341); *Blackman v. Barnton* (15 C. B. N. S. 432); *Brown v. Clifton* (10 W. R. 85); *Ex p. Cale v. The Hall Dock* (11 W. R. 284).

quently increased by the sum of £9 6s. 9d. under a rule of court, amounting in all to the sum of £179 17s. 7d., for which sum, less £5 3s. 9d., paid on account, a fi. fa. against goods was placed in the hands of the Sheriff of Oxford, who afterwards returned it nulla bona on which a fi. fa. against lands issued, which was once renewed, and then expired.

This last writ was endorsed for £178 8s. 10d., with interest on damages from the 15th November, 1861, and on the costs from the 4th of January, 1862. Smart acknowledged to have received on account of this sum £91 6s. and no more, including the sum of £5 3s. 9d. before mentioned leaving due to him £88 6s. 7d. besides interest.

Smart, on or about the 18th May, 1860, assigned the judgment he held against Miller to Charles L. Beard, in trust for certain of Smart's creditors, who were named in the assignment, and Beard still held the assignment. The creditor's claims were stated at \$618.71.

Beard stated that there were still due on the judgment against Miller \$396.75, or thereabouts, with interest from the 19th November, 1862.

Thomas John Cottle, for whom Miller was Solicitor, recovered a judgment against Smart, on or about the 29th June, 1858, for £38 4s. 10d., and this judgment Cottle assigned to Miller on the 8th August, 1863—the recovery being for mortgage money, and Cottle, on the 4th August, 1860, assigned this mortgage to Miller.

On the 20th January, 1864, Miller recovered a judgment in the County Court of Oxford for £42 19s. 2d. against Smart upon this mortgage, and the Sheriff of York and Peel now has a fi. fa. in his hands to levy £50 5s. 2d., but Smart's goods were claimed by his father.

On the 20th August, 1865, another judgment on this mortgage was recovered against Smart, in the Division Court, at Woodstock, for which an execution was issued to levy \$47.81.

On the 25th November, 1865, another judgment on the mortgage was recovered against Smart in the Queen's Bench, on which an execution was in the hands of the Sheriff of Oxford to levy £129 0s. 0½d.

Miller stated that after Smart became aware that Miller had become assignee of the mortgage, he (Miller) believed that Smart made the assignment to Beard, who informed Miller that the same was voluntary and for the purpose of paying certain creditors.

There was a Chancery suit of *Jury v. Burrows*, in which by an order of the Court of the 26th November, 1864, one James H. Hull (primarily liable), and John C. Jury and Luke White the younger, and Richard Burrows and Albert Burrows were directed to pay to Miller £205 8s. for costs.

Upon this order an execution was issued on the 20th July, 1865, to the Sheriff of Oxford, the present garnishee, to levy the above sum, with interest, at six per cent. from the 23rd January, 1865, to be paid to Miller in pursuance of the said order and report. Upon the execution the Sheriff made this money.

This was the money which Smart desired to attach on this application.

As to this sum, Miller said that when the Chancery suit was commenced he had no partner; that about \$240 of it was payable to himself, and he had received from the Sheriff, or had had allowed to him before the attaching order was made herein, nearly all that was going to himself, and that the balance was due to him jointly with his partner, Alexander Finkle.

J. A. Boyd, for the Sheriff, the garnishee, contended:—

1. Money made by the sheriff is not seizable under another execution: *Wood v. Wood* (4 Q. B. 397); *Collingridge v. Paxton* (11 C. B. 683); *Masters v. Stanley* (8 Dowl. 169).

2. Under the custom of London, money in the Sheriff's hands levied under a *fi. fa.* is not attachable: *Ashley*, 28; 1 Leon. 264; *Locke on Foreign Attachment*, 33, 45; *Com. Dig. Attachment, D*; *Humphrey v. Barns* (Cro. El. 691); *Brandon on Foreign Attachment*, 36.

3. A Sheriff as a public officer is not within the garnishee clauses; *Drake on Attachment*, 251, 503, to 508, where

the American cases are collected. The Court of Chancery will not allow a Receiver to be made a garnishee: *DeWinton v. Mayor of Brecon* (28 Beav. 200); *Forsyth's Custody of Infants*, 54, citing *Lord Manvers in Wellesley v. Wellesley* (2 Bligh, N. S. 42); *Rex v. Isley* (5 A. & E. 441). So the Sheriff here is answerable to the Court of Chancery under the terms of this execution.

4. Although the Statute in general applies to debts for which an action will lie, yet it is not shewn that the Sheriff has made a return to the writ, or that Miller has made a demand upon the Sheriff for payment, and without one, or both, an action for money had and received will not lie by Miller against the Sheriff for the money. *Jeffries v. Shepherd* (3 B. & Al. 696).

5. An execution creditor has special remedies against the Sheriff by way of attachment, and by action for damages against the Sheriff and his surities, which he will be deprived of if the Sheriff is deprived of his official character, and the debt allowed to be garnished as an ordinary debt; if the Sheriff be insolvent the creditor would lose his debt. The case of *Murray v. Simpson* (8 Ir. C. L. Re p. appendix 45), was an *ex parte* application, and cannot be much relied on as settling the right to attach money in the Sheriff's hands.

J. B. Reid, for Miller, relied on the arguments before advanced against the creditor's claim, and contended that as the money in the Sheriff's hands was the partnership money of Miller and Finkle, it could not be attached for Miller's individual debt; that Smart having assigned to Beard, the assignee could not attach at all, but if he could, then Miller, as the assignee of the judgment of Cottle against Smart, was entitled to have the same set off against the judgment in Smart's favour. He referred to *Caila v. Elgoode* (2 D. & R. 193); *Alden v. Boomer* (2 Pr. Rep. 339), as showing that the money could not be attached in the Sheriff's hands, and the C. L. P. Act, secs. 287 to 291; *Baynard v. Simmons* (5 E & B. 59); *Hirsh v. Coates* (18 C. B. 757); *Clarke v. Clarke* (8 U. C. L. J. 108); *Kerr v.*

Fullerton (Ib. 222) ; and Alden v. Boomer, before mentioned, as shewing that Beard, as assignee, could not attach a debt as the assignor could.

Osler, for Beard, the assignee, contended that the money in the Sheriff's hands was attachable, and that the assignee could enforce the process for that purpose in like manner as the nominal judgment creditor could: *Miller v. Thompson* (1 Prac. Rep. 245) ; *Reed v. Smith* (Ib. 321) ; *Standeven v. Murgatroyd* (27 L. J. Exch. 425) ; *Bristowe v. Needham* (8 Sc. N. R. 366) ; 2 Story's Eq. Jur. 240.

H. Cameron, for Smart. It is expressly laid down in *Murray v. Simpson* (8 Ir. Cl. Rep. app. 45), that money in the sheriff's hands might be attached. *Atkinson on Sheriffs*, 1861, 262; *Watson on Sheriffs*, 295.

ADAM WILSON, J.—The only questions I have to decide are:—

1. Whether Beard, the assignee of Smart, can apply to attach a debt in like manner as Smart himself could, or if not, whether Smart, after making an assignment, can still apply as the nominal creditor.

2. Whether if such an application can be made by either Smart or Beard, the money in the hands of the Sheriff, the garnishee, made under an execution issued from the Court of Chancery, or any Court of Law, can be attached.

3. Whether, if such money be attachable, it must not be restricted to Miller's individual share of it, and the partnership portion of it, which he shares with Finkle, be excluded.

4. Whether Miller is not entitled to set off the judgments recovered in Cottle's name against Smart, of which Miller is the assignee, against Smart's judgment, or against whatever portion of it may be attached in the Sheriff's hands on account of it.

If there be any questions as to amounts or dates, it must be referred to the Master to ascertain them.

As to the first question, the Statute speaks only of the judgment creditor, and not of his assignee or executor, but

this is no argument against the rights of the assignee or executor. I had no doubt during the argument about Beard's right to proceed in Smart's name as an attaching creditor, and I have none now.

As to the second question, the case referred to, or *Murray v. Simpson*, is directly in point, that money in the hands of the Sheriff, made under an execution, may be attached, and it is so laid down in Archbold's Pr., 11th edition, 701, referring to this case.

I do not think the Sheriff, as a public officer, can claim to be exempted from responsibility on the like grounds which are applicable to the Governor of a colony, as in *Macbeth v. Haldimand* (1 T. R. 172), or to the Secretary at War, as in *Gidley v. Palmerston* (3 B. & B. 275), because in such cases no action will lie against these functionaries at all, even by the person for whom they may have received a share of the public money, while it is clear the Sheriff may be sued by the person for whom he has levied and received money upon an execution.

In Sir John Perrott's case (case 35, 1 Leon. 29), it was held, that to a *sci. fa.* upon a judgment the defendant could not plead that the money due by the judgment had been attached by the custom of London, "for that a duty which accrued by matter of record could not be attached by the custom of London—judgments in the King's Courts cannot be defeated by such particular customs"; so damages levied by the Sheriff on a *fi. fa.* cannot be attached by the custom, "for the custom cannot reach upon a thing of so high a nature as a record is." So, formerly, it was held that a judgment debt would not pass to the assignees in bankruptcy of the judgment creditor. See also 1 Leon. 264 (case 353), *Edwards v. Tedburies* (1 Leon. 189, case 268).

Attachment will not lie against any person in respect of goods, against whom, in respect of them, an action is pending in the Superior Court: *Brandon*, 32; *Humphrey v. Barns* (Cro. El., 691).

In *De Winton v. Brecon* (28 Beav. 200), the Receiver was held not to be liable to an attaching order issued from one of the Superior Courts of Law, because it is actually money

belonging to the Court of Chancery, and the Receiver can only discharge himself by paying it in obedience to the direction and order of that Court.

The law in the United States, according to *Locke on Attachment*, section 251, certainly is, that money in the hands of the Sheriff, being held to be in custodia legis, is not subject to attachment; and see, also, secs. 503 and 508, where reference is made to the English authorities in *Leonard, Com. Dig.* and *Bacon's Abridgment*.

The case of *Wood v. Wood* shews that money made by the Sheriff for an execution creditor cannot be applied or seized by him under an execution against that creditor by virtue of the Statute which authorizes the Sheriff to take money, because it was not the specific property of the party which the Sheriff had in his hands, and had not been set apart or ear-marked for the person for whom it was made. The Statute applies to money in the debtor's own hands—the amount which the Sheriff returns is merely a debt which he could not seize under the *fi. fa.* against the person to whom the Sheriff owed the debt. *Collingridge v. Paxton* is to the same effect.

The reason why money levied by execution and in the Sheriff's hands cannot be attached by the custom of London in that which is given in *Sir John Perrott's case*, for the custom cannot reach upon a thing of so high a nature as a record is, and judgments in the King's Court cannot be defeated by such particular customs." So, from the authorities before cited, and more particularly collected in the references in *Com. Dig.*, money or property which is the subject of a suit in the Superior Courts cannot be affected by the powers of the Inferior Court, nor even when an application is merely pending in one of the Superior Courts, as upon an allocatur to pay costs, or when a reference is made from the Superior Courts. The money while with the Sheriff, has also been considered as in custodia legis, and so not liable to attachment; but after the Sheriff paid it over to the attorney, it may be attached: *Locke on Attachment*, p. 33.

Whether this is so, is not quite clear; for this is not the

reason given why money made by the Sheriff under an execution cannot be seized under another execution. The reason is, that money cannot be sold, and that until specific appropriation it has no separate existence as any particular person's property, and when it has been so appropriated it becomes a mere debt: *Willows v. Bate* (2 N. R. 376), and the cases before mentioned. It is nowhere stated that the money in the Sheriff's hands cannot be interfered with by such a process because it would be subjecting a public officer to unnecessary trouble and inconvenience.

It is stated in *Drake on Attachment* that the surplus money in the Sheriff's hands held by him for the debtor, may, after the creditor is satisfied, be attached by another creditor.

Now, none of these reasons appear to me to protect money levied by a Sheriff, and in his hands, from being attached under the Statute. It is a debt owing by the Sheriff to the creditor—it is subjected to seizure, not by particular custom of one inferior tribunal, but by a general Act of Parliament; there is, therefore, no indignity attempted against the Superior Courts by giving effect to such process, and no difficulty, or inconvenience, or loss can happen to the Sheriff in such a case, for the Courts will see that he is properly protected.

I do not think that the fact of Miller having the right to sue the Sheriff and his sureties under their statutory covenant to recover this money, and that the attaching creditor may not be able to exercise this right, is a sufficient reason for holding that money can never be attached in the sheriff's hands. It might happen to lead to inconvenience in some cases, if the Sheriff happened to be insolvent; but perhaps it might be held that the loss should fall upon the attaching creditor, if the debt were lost from such cause by his insisting upon enforcing his strict rights against the Sheriff individually.

It seems if a defendant be in custody on a *ca. sa.* he may be treated as a garnishee of the same debt without entitling him to be discharged: *Hartly v. Shemwell* (1 B. & S. 1).

In *Brandon on Attachment*, 35, the reason given why rent cannot be attached is because a distress lies for it.

But it is said if the right to restrain be lost, the rent may then be attached. I do not, however, think that the garnishee is entitled to succeed on this objection, because it might as well be said that a judgment debt cannot be attached, because it might be levied for by *fi. fa.* or *ca. sa.* As the garnishee is not discharged by anything short of payment of the debt or execution levied on his property for it, so the creditor of such garnishee is not precluded from enforcing any of his remedies to compel payment, notwithstanding the debt has been attached or an order made to pay it over: *Sykes v. The Brockville and Ottawa Railway Company* (22 U. C. R. 459).

I come, therefore, to the conclusion, in accordance with the express decision referred to, that money made by the Sheriff under an execution is attachable in his hands for the debt of the person to whom he made the money. As the judgment debt, before levy, could be attached, I do not see why it should not be equally liable to be attached after it has been made.

As to the third point, it appears that the debt owing to two cannot be attached to satisfy the claim of a creditor against only one of these two, because he could not sue the two for it. In this case the money is nominally all payable to Miller; but he declares that nearly all that is now payable by the Sheriff is payable to himself and Finkle, his partner, jointly. No doubt Miller could singly sue the Sheriff for the money; but there is no question that no part of the money, if it were payable to Miller, could be taken for his debt, if he had assigned it to another, and I think that a co-partner, for whom the money has been actually made, is as much entitled to be protected as the assignee of a debt—the rights and interests of Finkle must, therefore, be protected in any order I may make.

As to the fourth point, I think Miller is not entitled to set off his claim against Smart's judgment, which had been assigned for the benefit of creditors, before the recovery of any of the judgments against him, held by Miller, upon which anything is due. I cannot try the question of the

bona fides of this assignment. I see nothing which impeaches it.

I shall, therefore, make an order of reference to the Master to ascertain how much of the money in the garnishee's hands under the Chancery process before mentioned (if any of it), is the separate money or debt of Miller, and direct that such separate portion shall be ordered to be paid over by the garnishee to the judgment creditor.

I see no difficulty in doing this, although there has been no return made by, nor any demand made upon the Sheriff. It is not necessary to wait for a return before suing, and as to the demand this summons is a sufficient demand. If no money could be attached which was payable on demand, until the person to whom it was payable had first demanded it, it would make useless to a certain extent the provisions relating to the attachment of debts.

I shall make this order, as before stated, saying nothing as to costs on any side.

Order accordingly.

IN RE W. M. ROSS.

Insolvent Act, 1865, sections 3, 12, 13—Effect of stay of execution as to priority—Lien of seizing creditors for costs—Sheriff's fees.

Judgment creditors having executions in the Sheriff's hands, under which a seizure had been made, signed an agreement giving the defendant an extension of time, for payment on performance of certain covenants therein mentioned. Upwards of thirty days afterwards the defendant made an assignment under the Insolvent Acts, the conditions of the agreement for extension of time having been up to that time performed.

- Held*, 1. That the writs were not in the Sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the Sheriff took priority.
2. That the seizing creditors had no lien for their costs under secs. 3, 12, 13, of the Act of 1865, the right of lien there given applying solely to the law of the Province of Quebec.
3. That the Sheriff had no lien or claim on the goods seized for payment of his fees.

[CHAMBERS, September 6, 1866.]

This was an appeal by the assignee in insolvency of one William McKenzie Ross, on a petition presented by the

Sheriff of the County of Kent, from an order made by the Judge of the County Court of the County of Kent, directing the Sheriff to pay the proceeds of the writs of execution in his hands to the various execution creditors, and holding that such executions took priority of the assignment, having been delivered to the Sheriff more than thirty days before the execution of the assignment.

The further facts of the case sufficiently appear in the judgment.

Burns, for the appellant.

Richards, Q.C., and Osler, for the execution creditors.

J. B. Reid, for the Sheriff.

The following cases were cited:—*Bank of Montreal v. Munro* (23 U. C. R. 414); *Foster v. Smith* (13 Ib. 243); *Hunt v. Hooper* (12 M. & W. 664); *Kempland v. McAulay*, (1 Peake 95; 4 T. R. 436); *Lovick v. Crowder* (8 B. & C. 132); *Pringle v. Isaac* (11 Price 445); *Wall v. Cahill, Cr. & Dix*. Ab. C. 370; *Kirwan v. Jennings* (3 Ir. C. L. R. 48); *Semple v. Keen* (3 H. & N. 753); *Withers v. Parker* (4 H. & N. 524); *Parry v. Great Ship Co.* (4 B. & S. 556).

JOHN WILSON, J.—By the 13th section of the Act of 1865, amending the Insolvent Act of 1864, “no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, unless such writ of execution shall have issued and been delivered to the Sheriff at least thirty days before the execution of a deed of assignment, or the issue of a writ of attachment under the said Act.”

I read this clause, as meaning, that the writs spoken of have been delivered to the Sheriff to be executed, not merely that they are in his hands. Now, were these writs in the Sheriff's hands to be executed?

On the 29th December, 1865, Andrew McFarlane and Robert McFarlane had an execution against Ross for \$404.80, and costs \$28.50, exclusive of the costs of the writ, which they then delivered to the Sheriff. On the 8th day of January, 1866. James Baillie had an execution against him for \$430, and costs \$60.33, exclusive of the costs of the writ which he delivered to the Sheriff. On the 8th of March, 1866, William A. Smith and Orpheus J. Barnes had an execution against him for \$103.16, and \$32.42 for costs, exclusive of the costs of the writ, which they delivered to the Sheriff.

On these writs, soon after their delivery, the Sheriff made a seizure of goods belonging to Ross, but, on being shewn the agreement hereinafter mentioned, and finding it signed by the two first execution creditors, allowed him to continue his business without taking actual possession of the goods seized, as I understand it.

During a part of January and February, Ross obtained from all his creditors, as he alleges, the agreement now before me:—

“The undersigned William McKenzie Ross, of Chatham, trader, and divers his creditors hereby declare: that inasmuch as the said William McKenzie Ross has asked an extension of time to meet his liabilities, which the said creditors, under certain conditions, are willing to grant. Therefore it is agreed between them as follows:—

1. “That the said William McKenzie Ross shall forthwith deposit in the hands of the Honorable John J. C. Abbot, Q.C., Advocate, promissory notes amounting to one thousand four hundred and twenty-seven dollars, now in his possession, and shall give the said Honorable John J. C. Abbot a full and irrevocable power of attorney for him and in his name to make an assignment of his estate and effects under the Insolvent Act of 1864.

2. “Francis Stephen, of Montreal, aforesaid, gentleman, chosen by both parties, shall forthwith proceed to Chatham to investigate the estate of the said Ross, and report thereon to Ijuiced Beak, Esquire, of Montreal, Merchant, for the

creditors: If by such report the estate of the said William McKenzie Ross should shew sufficient to pay his liabilities in full, computing the stock on hand at its cost in Montreal, then the said Honourable John J. C. Abbot, as the Attorney of the said William McKenzie Ross, shall execute such assignment under the Insolvent Act of 1864.

“If by such report the estate of the said William McKenzie Ross should shew sufficient assets to pay his liabilities in full, computing the stock on hand at its cost in Montreal, the undersigned creditors will grant the said Ross extension of time for three, six, and nine months for the payment of his liabilities to them by three equal instalments; and in that event the promissory notes to be deposited with the said Honorable John J. C. Abbot shall be delivered to the creditors, and their proceeds shall be appropriated as received to the payment of that instalment of his liabilities which shall become due next after the reception thereof.

The expenses of the said Francis Stephen in the said investigation and report, shall be defrayed by the said creditors proportionately to the amount of their several claims, or by the estate of the said William McKenzie Ross if it be assigned.

The agreement not to be binding except all sign.

(Signed) BANKAGE, BEAK & Co.

ANDREW McFARLANE & Co.

ROBERT SEATH.

W. D. MILLER & Co.

A. McDONALD & Co.

JAMES PATTERSON.

WALTER McFARLANE, BARR & Co.

MIMDERTON & STEAUKEN.

(Agreed; but in the event of any instalment not being punctually paid, our judgment to be executory at once).

W. BAILLIE & Co.

W. A. SMITH & Co.

CHARLES J. S. ASKIN.

GORDON & MCKAY.

The last of these executions appears to have been placed in the Sheriff's hands through mistake, as the attorney for the plaintiffs seems not to have been informed of the agreement.

In the face of this agreement, can it be said these executions were in the Sheriff's hands to be executed? I think not. If there had been judgment creditors who had not entered into the agreement, and had placed their executions in the Sheriff's hands to be executed, would they not have been entitled to priority as against the executions in question, on the authority of *Bank of Montreal v. Munro*, 23 U. C. R. 414.

The deed in insolvency was executed on the 12th day of May. The first three months of the extended time had not then expired, and none of the execution creditors had then a right to enforce their executions, for Ross, it appears had made good the preliminary stipulations of the agreement to give its effect.

But the object of the agreement was to have the estate of Ross put into insolvency in case he made default in the fulfilment of it, beyond its preliminary stipulations, and all the creditors were to share in the estate. In this view, it would be manifestly unjust to give these execution creditors the priority and preference which they now claim. It is true, that some of these creditors signed the agreement under a condition, but the default had not arisen to give them the right to enforce these executions, when the deed in insolvency was executed.

It has been urged under the 13th section of the 29 Vic. chap. 18, that these plaintiffs were entitled to costs, and the Sheriff to his fees. I know of no law which gave a lien for costs or fees in Upper Canada, as now contended. The latter part of the section has reference in this respect to the law of Lower Canada, and has, therefore, no application in this case.

The learned County Court Judge does not appear to have had his attention directed to the cases to which reference has been made, nor was the object of the agreement under his consideration, for he would not have allowed these parties

to take advantage of their own wrong in trying to enforce their executions in contravention of their agreement. For these reasons the appeal will be allowed, and the execution creditors will have no priority.

This will operate to the apparent prejudice of the Sheriff, who will, in this view of it, not be entitled to his costs out of the estate, but must look to the plaintiffs, in these writs for his fees. As the law now stands, a Sheriff is not entitled to poundage unless he makes the money on the execution; nor is he entitled to claim his fees on an execution which has lost its priority, as against one which has obtained it. He stands frequently in this position, that he loses his fees, either by granting time himself or by allowing a writ to lose its priority without insisting on his fees at the time. As this matter stood, the Sheriff had an apparently fair claim as against the estate for his fees, although in law he had not. There will be no costs allowed against the Sheriff on this appeal.

Appeal allowed.

A DIGEST

OF THE CASES REPORTED IN THIS VOLUME.

AFFIDAVIT.

See ARREST, 1—HABEAS CORPUS, 1
—RULES AND ORDERS, 2.

AMENDMENT.

See JUDGMENT, 1, 4—LACHES, 2—
WRITS, 3.

APPEARANCE.

See CERTIORARI.

ARBITRATION.

1. *Certifying for costs* — *Rule of Court, No. 155* — *Final Judgment—Recovery without trial.*] — A cause was referred, before trial by Judge's order, costs to abide the event, and the arbitrator awarded £9 3s. 9d., the claim being originally of the jurisdiction of the County Court, and having been reduced by set-off. The plaintiff applied for full costs, on affidavit shewing that he intended to enforce his award by rule of Court and execution under Con. Stat. U. C., ch. 24, sec. 19.

Held, that he must be considered as obtaining final judgment without trial, and the case came within the

rule of Court No. 155; for under the Statute above mentioned, the proper mode of proceeding is to enter a judgment, and at all events, as the more convenient course for the plaintiff would be to enforce the award under C. L. P. A., sec. 84, the Court would not enable him to take advantage of the other method merely to evade the rule and obtain full costs.—*Watson v. Garrett et al.*, 70.

2. Two actions for false imprisonment were referred to arbitration at the Assizes, no verdict being taken, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award, held, that he was entitled to full costs without a certificate.

Such a case is not within the 155th rule of Court, for the plaintiff cannot be considered as proceeding upon the final judgment.—*Cochrane v. Scott et al.*, and *Cochrane v. Cross et al.*, 32.

[Moved against in full Court of C. P., but rule discharged on 13th June, 1859.]

3. *Semble*, that the rule of T. T., 24 Vic., which provides that "In any action of the proper competence of the County or Division Courts respectively, in which final

judgment shall be obtained by a plaintiff without a trial, or in which plaintiff shall obtain execution on proceedings in the nature of a final judgment, no more than County or Division Court costs, as the case may be, shall be taxed without a special order of the Court or a Judge, &c.," applies, in the case of a cause referred to arbitration by compulsory reference, to the whole costs in the action, including the costs of the reference and of the award, and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action.

Held, that under any circumstances, such was the proper construction of the order of reference in this cause, by which "the cause and all matters of dispute therein were referred to arbitration, with power to the arbitrator to certify for costs, in the same manner as a Judge at Nisi Prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event."—*Johnson v. Morley et al.*, 217.

[See Costs, 10.]

4. *Verdict subject to award—Arbitrators having power to certify.*—A cause was referred at nisi prius, and a verdict taken subject to the award. Costs of the cause were to abide the event, and the same power was given to the arbitrators to certify for costs as the Judge at the trial would have. The award reduced the verdict to \$68, and directed that the defendant should pay the plaintiff's cost of suit according to the scale to be certified by the Court of Queen's Bench.

Held, that the arbitrators having express powers to certify, and hav-

ing omitted to do so, a Judge in Chambers had no power to order full costs.—*Calder v. Gilbert*, 127.

5. *Costs—Discretion of arbitrator.*—Where a cause was referred to arbitration, costs of the cause to abide the event and costs of the reference in the discretion of the arbitrator, and an award of £4 was made in favor of plaintiff, the taxing officer refused to tax costs subsequent to the making of the award as Division Court costs only, and his decision was upheld.—*Fleurynek v. Clifton*, 216.

6. *Costs to abide event.*—Where a cause is referred, costs to abide the event, the plaintiff is not entitled to full costs if he is awarded anything, but to such costs only as he could have claimed if he had recovered the same amount.—*Watson v. Garrett*, 70.

7. *Con. Stat. U. C., ch. 24, sec. 19—Order to pay money awarded—Execution.*—Sembles, that the Court when applied to for a rule to pay over money awarded under the Statute above mentioned, will exercise the same discretion as formerly on motion for attachment, for which this remedy is now substituted.—*Ib.*

8. To obtain execution under *Con. Stat. U. C., ch. 24, sec. 19*, for money awarded, it is not sufficient to make the submission a rule of Court. The defaulter must be called upon to shew cause why he should not pay, specifying the sum, and a rule absolute obtained.

The award in this case ordered certain securities to be assigned to a trustee, who was to dispose of them, and out of the proceeds pay a certain sum to the applicant. Semble, not an award on which an order to pay

would be granted.—*Re Thomas and Brooke*, 78.

9. A rule nisi calling upon defendant to shew cause why execution should not issue against him for a sum awarded, the submission having been made a rule of Court and the sum demanded, was discharged on the ground that the plaintiffs should first have called upon him by rule to pay.—*Niagara and Detroit Rivers R. Co. v. Buckwell*, 82.

Awards payable by instalments—Order to pay.—The awards directed payment of a sum by monthly instalments, with a proviso that on default in payment of any of them the whole should fall due. *Quære*, whether the Court would order payment of the whole sum, unless it were shewn that defendant had notice of the award before default made.—*Ib.*

10. *Reference back.*—The questions referred to arbitration related to partnership notices, &c., said to be intricate, and to require much consideration. The award was made by two of the three arbitrators, and directed that one party should pay the other \$5 in full of all sums due on account of the purchase of his interest in the business, but it contained no provision that the person paying should receive a power of attorney to collect the debts, &c., nor the other provisions proper in such cases. On motion to set aside or refer back it appeared that the award was made more hastily than it would otherwise have been, owing to a mistaken impression that the time could not be enlarged. One of the arbitrators who concurred in the award made an affidavit, filed in moving the rule, that he believed the sum was too small and the award

inequitable, and it was sworn that on the same evening he had said it ought to be \$250; but he afterwards made another affidavit, used on shewing cause, that he believed the award was just as likely to be correct as if it had been \$200.

Held, that under these circumstances, it could not be said that this arbitrator had fully considered or really pronounced judgment on the questions submitted, and the matters were referred back.—*In re Ingersoll and Elwood*, 162.

11. On motion to set aside or refer back an award, it was alleged that a sum of \$122 had been twice charged against the plaintiff, being identical with a judgment also allowed against him, and that since the award he had discovered a certain note which tended to prove this; and the arbitrator certified that in his opinion the matter should be re-opened, as he was not sure that this was not the case. It was objected also that the judgment was improperly allowed, having been recovered against the plaintiff and another, and therefore not admissible as a set-off.

In answer, the mistake was denied, and it was shewn that the identity of the two sums had been a point expressly in dispute before the arbitrator, and that judgment had been recovered on a note made by the plaintiff, and endorsed by another defendant in the suit upon it for his accommodation. It was sworn also that the plaintiff was insolvent. The application was refused.

Quære, whether under the circumstances the judgment was not properly allowed by the arbitrator as a set-off.—*Latta v. Wallbridge*, 157.

12. *Taxation of arbitrators' fees.*] —Held, that arbitrators' fees may be referred to the Master for taxation. —*Scott v. Grand Trunk Railway Co.*, 276.

13. *Time for moving against proceedings on a reference to arbitration at trial without verdict.*—See NOTICE OF TRIAL, 2.

ARBITRATOR.

See ARBITRATION.

ARREST.

1. *Omission of the Court in affidavit.*]—The name of the Court must be inserted in an affidavit to hold to bail at the time of suing out the process, and where it is not inserted until long after defendant had been arrested, the arrest was set aside.—*Allman and Wife v. Kensel*, 110.

2. *Slander.*]—In this case the action was by husband and wife for a verbal slander of the latter, not actionable without proof of special damage, and the affidavit stated only that persons not named had in consequence, withdrawn their custom from her husband, who was a tailor. The learned Judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only.—*Ib.*

3. *Reviewing decision of County Judge.*]—Quære, as to the right of a Judge in Chambers to review the decision of a County Court Judge.—*Ib.*, and *Bowers et al. v. Flower*, 62.

4. *Setting aside — What must be shewn by plaintiff.*] — Held, on an

application to review the decision of a County Judge, that defendant must be discharged; that the denial of the debt alone would not be sufficient, though the facts and circumstances relating to the claim might be important to consider as affecting the probability of his absconding; but that an apprehension of his leaving at some future period could nor warrant the arrest, for the Judge must be satisfied that he is about to leave unless forthwith apprehended, that is, to leave forthwith.—*Bowers et al. v. Flower*, 62.

5. *Setting aside—Putting in bail.*] —Held, that defendant by putting in special bail after having given a bond to the Sheriff, had not precluded himself from making an application to set aside arrest.—*Ib.*

6. *Setting aside — Sufficiency of affidavit — Defendant's affidavit.*]—On an application to set aside an arrest under 22 Vic. ch. 96, semble, that the existence of the cause of action may be enquired into, but that the absence of it must be very clearly shewn to warrant interference.

Held, that on the affidavits set out in this case, the cause of action and the circumstances to warrant the arrest were sufficiently made out.

Semble, that defendant's own affidavit that he is not about to leave the Province would not alone, under any circumstances, be sufficient to set aside the arrest.—*Delisle v. Degrand et al.*, 105.

7. *Arrest by the use of criminal process—Denial.*] — Where application was made for the discharge from custody of a defendant, arrested under a writ of *capias*, upon the ground that his arrest was

procured through a trick, by means of the use of criminal process, which, when it had served its purpose, was abandoned, and the affidavits filed in answer positively denied the trick and all collusion of every kind; the Judge, without inquiring into the question whether the arrest of defendant under the criminal process was legal or illegal, discharged the summons.—*Glennie v. Ross*, 281.

8. *Setting aside on condition of no action being brought — Subsequent action stayed.*—Where a person in custody under a writ of *capias*, had obtained a Judge's order for his discharge, upon condition that he should bring no action for the arrest, and afterwards acted upon the order, he was held bound by its terms in its entirety, and an action for malicious arrest subsequently brought by him against the party who caused the issue of the writ of *capias*, was stayed with costs.

Graham v. Thompson (16 U. C. R. 259), held inapplicable to the present state of the law.—*Hall v. Brown*, 293.

ASHBURTON TREATY.

Burglary.—Held, that burglary is not an offence within the meaning of the Ashburton Treaty or the Statutes of Canada passed to give effect to the treaty.—*In re Laverne Beebe*, 273.

ATTACHMENT.

For not obeying peremptory mandamus.—See *MANDAMUS*.

Against Sheriff for insufficient return of writ of replevin.—See *REPLEVIN*, 3.

ATTACHMENT OF DEBTS.

1. *Salary payable at will.*—A salary payable to the physician of a municipal corporation, who holds his appointment at the will of the municipal corporation, at an annual salary of \$400, payable quarterly, is neither a debt due nor accruing due within the meaning of the C. L. P. Act, and therefore cannot be attached at the instance of a creditor having an unsatisfied judgment against the physician.—*Shanly v. Moore*, (Corporation of London, garnishees), 225.

2. *Several creditors — Debt accruing due by portions.*—The sum attempted to be garnished was money awarded to the judgment debtor, of which, according to the affidavit of one of the arbitrators, a certain sum was for work done under a contract, and the remainder for damages which he had sustained by having the work taken out of his hands: Held, that as this latter portion did not become a debt until the award was made, only the attaching orders coming in after the award would bind it, not those before.—*Tate v. Corporation of Toronto*, 181.

3. *Assignment of judgment—Money in hands of Sheriff—Debt due to two parties.*—Held, (1.) That the assignee of a judgment creditor can proceed in the name of the latter to attach a debt.

(2.) That money made by a Sheriff under an execution is attachable in his hands for the debt of the person for whom he made the money..

(3.) That a debt owing to two cannot be attached to satisfy the claim of a creditor against only one of those two.—*In re Smart v.*

Miller, (Andrew Ross Sheriff, garnishee), 385.

4. *Service of order and summons—Unauthorized acceptance — Waiver.*]

—An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance endorsed, was afterwards served in the same way as the order. On the return of it, another attorney appeared for the garnishee, and objected that the acceptance was given without authority, and that the service was insufficient.

Held, that personal service of the summons and order was not indispensable, but that the service in this case if moved against would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had to come to the knowledge of the garnishee; but

Held, also, that in this case no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured.

Held, also, that the appearance of the garnishee by another attorney duly authorized was a waiver of any objection to the service.—*Ward v. Vance* (Thompson, garnishee), 130.

Death of garnishee before order to pay—Service of order.] — A summons upon a garnishee to pay over having been opposed, the Judge took time to consider, and before the order was granted the garnishee died. Held, that the delay being that of the Judge, the order was void,

but might be amended, and dated as of the day of argument.

Quære, whether in strictness all orders should not be thus dated.—*Ib.*, 210.

6. *Issue Directed.*] — The executor of the garnishee having on affidavit denied the debt, and imputed collusion between the judgment creditor and judgment debtor, which was not denied, the attaching order was rescinded, and an issue directed on payment of costs.—*Ib.*

7. *Suggestion of death of garnishee—Execution.*] — There is no power in the Court or Judge to order or permit a suggestion to be entered of the death of a garnishee so as to legalize execution against his executors or administrators.—*Ib.* 323.

8. *Several creditors — Priority.*] — Where several judgment creditors proceed against the same garnishee they are entitled to be paid in the order in which their attaching orders are served, not rateably.—*Tate v. Corporation of Toronto*, 181.

Claim by assignee of debt—Interpleader.] — See INTERPLEADER, 3.

ATTORNEY.

1. *Taxation — “Special circumstances.”*] — The plaintiffs acted as attorneys for defendants from 1854 to 1858. In 1855 they had a large claim for costs, which it was agreed to refer to arbitration, but defendants settled it on a reduction being made. The plaintiffs afterwards continued to act, and rendered full bills each half year, no objection being made to them until a short time before this action, which was brought by the plaintiffs in January, 1860.

Defendants on being sued applied to have the bills taxed, not pointing out any particular error, but alleging generally that the chargés were excessive.

Held, that "no special circumstances" were shewn, within the Consol. Stats. U. C., ch. 35, sec. 30, and the order was refused as to all bills delivered more than twelve months.—*Read et al. v. Cotton and Manning*, 118.

2. *Taxation — Third parties clause — Mortgagor and mortgagee.*] — The mortgagees of land having brought ejectment, and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "Solicitor's costs, \$143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale.

Held, that the mortgagor was clearly a person entitled to apply for taxation within the Consol. Stats. U. C. ch. 35, sec. 8.

That the two bills might be considered as particulars of the one item in the previous statement, and that the bill of costs in the suit drew with it the other bill, which would not alone have been subject to taxation; and both bills were therefore referred.—*Ex parte Glass*, 138.

AWARD.

See *ARBITRATION*.

BAIL.

Effect of putting in, on application to set aside arrest.]—See *ARREST*, 5.

BANKRUPTCY.

See *INSOLVENCY*.

BILLS OF EXCHANGE.

See *PROMISSORY NOTES*.

BURGLARY.

Ashburton Treaty—Form of Warrant.] — See *IN RE LAVERNE BEEBE*, 273.

Not within Ashburton Treaty.]—*Ib.*

CERTIFICATE FOR COSTS.

See *ARBITRATION—COSTS*.

CERTIORARI.

1. *Removal of suit by plaintiff.*]—Where the plaintiff, pending an issue in law, removed the case by certiorari from the County Court to the Queen's Bench, and defendant refused to enter an appearance after notice, an order to compel him to do so, or to assist the plaintiff to proceed, was refused.

Quære, as to the plaintiff's right to remove his own cause under such circumstances. — *Dennison v. Knox*, 150.

2. Held, that a plaintiff is not entitled to a writ of certiorari to remove his own plaint from a Division Court, he having deliberately selected that tribunal for the trial of it.—*Prudhomme v. Lazure*, 355.

3. *Declaration for a different cause of action.*] — Held, that although a plaintiff may, after re-

moval of his plaint from a Division Court, declare in the Superior Court in a different form of action, he cannot declare for a different cause of action.—*Mason v. Morgan*, 325.

CHANGE OF VENUE.

See VENUE (CHANGE OF).

CHATTEL MORTGAGE.

Possession taken by mortgagee—Execution against mortgagor.] — A mortgagee of chattel property having taken possession as he alleged, under his mortgage, the Sheriff seized it under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again: Held, that there was no power to make such order.

Semble, that under an execution against a mortgagor the Sheriff may seize goods in possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption.—*Smith et al. v. Cobourg and Peterborough R. W. Co.*, 113.

CONTESTED ELECTIONS.

1. *Disqualification of members of Council — Time to which disqualification relates — Costs.*] — Where it was shewn that the firm, of which defendant was a member, dealt in coal and wood, and, during the year 1864, supplied large quantities of both coal and wood to the corporation of the City of Toronto, without any agreement as to price or terms of payment, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city:

Held, that the defendant was disqualified, as being a person having an interest in a contract with the corporation.

So where it was shewn that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the coal furnished, but the price remained unpaid at the time of the election.

Where it was shewn that the price was paid before defendant took his seat he was still held to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to lose the costs necessarily incurred. Therefore in a case where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him.—*Reg. ex rel. Rollo v. Beard*, 357.

2. *Election of Reeve—Procedure—Time.*]—Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as Reeve was put and seconded, and no dissent was expressed, whereupon the clerk, in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the Reeve was held to have been duly elected.

Though the Statute declares that the members of every municipal council shall hold the first meeting at noon, and at such meeting organ-

ize themselves as a council by electing one of themselves as a Reeve, an election at six o'clock the same day, is a sufficient compliance with the Statute.—Reg. ex rel. Heenan v. Murray, 345.

COMPUTATION OF TIME.

Time of day for holding first meeting of municipal council.—See CONTESTED ELECTIONS, 2.

For setting down demurrer.—See DEMURRER, 1.

When to declare against prisoner.—See PRISONER, 1.

Delay in application to set aside judgment.—See LACHES, 1.

Delay in application to set aside notice of trial—Cause from the country.—See LACHES, 3-4.

Delay in proceedings necessary to obtain new trial.—See NEW TRIAL.

COSTS.

See ATTORNEY — CONTESTED ELECTIONS, 1—SECURITY FOR COSTS.

1. *Meaning of "costs in the cause."*—The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award as follows: "We also order an award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of \$201.50," it was held that the words "costs in the cause" meant the whole costs of the plain-

tiff and defendants.—Scott v. The Grand Trunk R. W. Co., 276.

2. *Title to land in question.*—Semble, that where in trespass quare clausum fregit defendant pleads that the land was not the plaintiff's, the plaintiff, if he succeeds, is entitled to full costs, though title is not brought in question at the trial (as in this case it was held to be), and the verdict is within the jurisdiction of the County Court.—Humberstone v. Henderson, 40.

3. *Cause struck out at trial—Nonsuit.*—Where defendant's counsel was ready at the assizes, and the plaintiff's counsel not being prepared, the cause was struck out. Held, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but their proper course was to have insisted upon a nonsuit.—Crofts v. McMaster et al., 121.

4. *Verdict by consent—Certificate—Rule of Court, No. 155.*—Where an action was brought on an open account, and a verdict entered by consent for the amount claimed, which was within the jurisdiction of the County Court; held (dissenting from Bonter v. Pretty, 9 C. P. 273), that it was a case in which, under rule of Court No. 155, a Judge in Chambers could make an order for full costs.—Cumberland et al. v. Ridout et al., 14.

5. *Replevin—Certificate.*—A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior Courts.—Ashton v. McMillan, 10.

6. *Fees for service of subpoenas.*] — *Semble*, that subpoenas being mesne process, under sec. 277 of the C. L. P. A., no fees can be allowed for mileage or service, if not made by the Sheriff.—*McLean v. Evans*, 154.

7. *Witnesses paid by both sides.*] — Where witnesses are subpoenaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other.—*Ib.*

8. *Witnesses not called.*] — Where witnesses are subpoenaed but not called, the Master should decide whether they were necessary or not, and allow or refuse their expenses accordingly.—*Ib.*

9. *Revision — Judge's order.*] — *Quere*, whether under the C. L. P. A., 1856, sec. 12, a Judge's order is not necessary to have taxation revised by the principal clerk.—*Cochrane v. Scott*, 32.

10. *Recovery without trial—Setting off costs.*]—*Held*, that where plaintiff, without a trial, recovers in a Superior Court, an amount within the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff, so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—the 328th section of C. L. P. Act not being applicable to such a case.—*Johnson v. Morley et al., Executors*, 217.

Arbitrators fees may be taxed.]—*See Scott v. Grand Trunk Railway Co.* 276.

In arbitration cases.] — *See ARBITRATION*, 1, 7.

Motion to rescind rule for new trial.]—*See NEW TRIAL*.

Bringing in record to tax costs and enter—judgment.]—*See RECORD*.

Lien for, in Insolvency cases.]—*See INSOLVENCY*.

COUNTRY CAUSE.

Application to set aside notice of trial—Delay.]—*See LACHES*, 3.

COUNTY COURT.

Jurisdiction — Title to lands in question.]—*See COSTS*, 2.

COUNTY COURT JUDGE.

Right of Judge in Chambers, to review decision of.]—*See ARREST*, 3.

Powers of puisne Judge.]—*See INSOLVENT DEBTOR*, 4.

DECLARATION.

See PLEADING.

Time to declare against prisoner.]—*See PRISONER*, 1.

After removal by certiorari.]—*See CERTIORARI*, 3.

Variance in.]—*See VARIANCE*.

DELAY.

See LACHES.

DEMURRER.

1. *Time for setting down.*]—A demurrer was set down by the plaintiff,

before opening of the Court on the first day of Michaelmas term, for argument on the second paper day, and afterwards about twelve on the same day, it was set down by the defendant for argument on the first paper day. During the same term, in Practice Court, a rule to strike out the demurrer entered by defendant was discharged, on the ground that the plaintiff's entry was improperly made before the Court had met. The Court, however, heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the Court. —*Moody v. Dougall*, 145.

2. *Right to renew application in Practice Court.*]—A motion in Practice Court in Easter Term, following to rescind the discharge of the previous application there, was refused as being contrary to established practice, but without costs, as the learned Judge who made the first order wished it to be moved against, and if possible rescinded.—*Ib.*

DISCHARGE FROM CUSTODY.

See ARREST — INSOLVENT DEBTOR.
1, 2.

DISCOVERY.

See INTERROGATORIES.

1. *Sufficiency of material for.*]—Plaintiff, as judgment creditor of H. & Co., had obtained a writ calling on defendant as garnishee to shew cause why he should not pay to the plaintiff a debt which he owed them, the allegation being that he had sold

certain goods of H. & Co., under a chattel mortgage which they had given him, and received more than the mortgage money. Held, that upon the affidavits set out in the case, enough was stated to call upon defendant to shew what books he had in his possession relating to the matters in dispute.

The plaintiff also swore that he believed the defendant had received certain notes and securities in connection with the sale, some of which remained in his possession. Held, insufficient, the documents asked for not being identified or shewn to exist.—*Small v. Eccles*, 189.

2. *Of documents not supporting applicants' case.*]—If defendant admits the possession of certain documents, but states positively, or even says he is advised and believes, that they will not support the plaintiff's case. Semble, that production will not be ordered.—*Ib.*

DIVISION COURTS.

Splitting demands — Prohibition.]

— Plaintiff rendered an account to defendant commencing with the amount of an account rendered on the 30th of June, 1862, and continuing to the 14th of October, when the balance, after allowing a credit of \$4.25, was \$106.43. In February, 1863, he sued in the Division Court, the statement of claim commencing with the 24th of April, and ending on the 10th of October, 1862, and amounting to \$99.31. He was allowed to recover without abandoning the excess, notwithstanding the production of the larger account rendered; and in May he sued for the

items included in that account, but not in the former action, and was also allowed to recover. Defendant then applied for prohibition.

Semble, that the application should have been made in the first suit, but the point was not settled, so, after rule nisi granted, the plaintiff consented to the writ going without cost. — *In re Grace v. Walsh*, 196.

Removal of causes from.] — See CERTIORARI.

EJECTMENT.

1. *Staying action whilst former suit pending.]*—Where an action of ejectment was brought by plaintiff against three defendants, whereon a verdict was rendered for plaintiff, and plaintiff afterwards, without discontinuing his action, commenced a second action of ejectment against two of the defendants for the recovery of the same premises, an order was made that unless plaintiff elected to discontinue one or other of the two suits, and gave the costs of the suit discontinued, the proceedings in the second action should be stayed. — *Grimshawe v. White et al.*, 320.

2. *Notice limiting defence—Amending issue.]*—Where a defendant limits his defence under Con. Stat. U. C., ch. 27, sec. 12, to part of the lands sought to be recovered, he is entitled to the four days allowed him by the Statute, even though this may have the effect of throwing the plaintiff over an Assize; and an order will not be granted to plaintiff to amend the issue served by him before the four days have elapsed, without prejudice to his notice of trial. — *Phillips et al. v. Winters*, 312.

3. *Limited defence — Order for judgment.]*—Where there is a limited defence in ejectment, it is irregular for the plaintiff to enter judgment without first obtaining a Judge's order, or a rule of Court, authorizing the signing of judgment, which rule or order, or a duplicate thereof, must, under rule 92, be filed together with the writ. — *Harrold and Wife v. Stewart et al.*, 335.

4. *Writ of execution should follow the judgment.]*—Semble, the writ of execution in ejectment should, as in other actions, follow the judgment, and where, by reason of a limited defence, the plaintiff is entitled to recover less than what he claims in his writ of summons, there should be some entry on the roll to authorize the deviation.—*Ib.*

6. *Judgment in favour of several plaintiffs — Death of one.]*—Held, that the death of one of two plaintiffs in ejectment after judgment (where, for all that appears, the recovery is joint, and survives), does not render necessary a suggestion of the death on the roll in order to support a writ of hab. fac. poss. for recovery of possession of the premises.—*Johnston et al. v. McKenna*, 229.

7. *Alias hab. fac. poss.—Revivor.]*—Where a writ of habeas was issued within one year after entry of judgment, an alias writ issued more than six years thereafter, is regular without reviving the judgment.—*Ib.*

8. *Presumption of release — Revivor.]*—Where the sheriff returned to the first writ of habeas, that "none came to receive possession," the presumption of release of the judg-

ment did not arise in the same manner as if nothing had been done upon the judgment.—*Ib.*

9. *Who may be removed on hab. fac. poss.*]—The writ may be executed by the removal from possession of a person who was the widow of a person that claimed under a judgment defendant.—*Ib.*

10. *Effect of recovery for too much—Execution for proper quantity.*]—The recovery on a judgment roll for the whole of a lot, when in fact plaintiff proved title to the east half only, is not such an irregularity as to cause defendant to move against the judgment.

The Court or a Judge will in such a case restrain plaintiff from taking possession of more than he in fact recovered.

The plaintiff in this cause having endorsed his writ for the recovery of the east half only, to which he proved title, is no ground for the interference of either Court or Judge.—*Ib.*

11. *Lease with right of purchase—Holding over.*]—The defendant went into possession as tenant of A. under a lease with a right to purchase at a certain sum. He elected to purchase and remained in possession for about a year after the determination of the lease, when plaintiff, the mortgagee of the lessor, brought ejectment and demanded security for costs and damages, as against a tenant overholding.

Held, 1. That the plaintiff was entitled to the relief asked, as the defendant's character as tenant had not been that of a vendee. 2. That it made no difference that the plaintiff was mortgagee of the lessor.—*Anonymous*, 350.

Writ varying from præcipe.] — See WRITS, 2.

EXECUTION.

1. Under the old law (before the 20 Vic., ch. 57, sec. 10) it was sufficient to issue a writ of execution within a year from the entry of judgment, and, was unnecessary also to return and file it within that time.—*Hall v. Boulton*, 142.

Issue of hab. fac. poss. within one year after judgment—Alias writ—Revivor.]—See EJECTMENT, 7.

2. *Service of summons to obtain order for payment of money and execution.*]—To obtain an order for execution under Consol. Stats. U. C., ch. 24, sec. 19, the service of the summons must be personal, or leave must be obtained to make it in some other manner.—*Clifton v. Durand*, 60.

3. Where an order for payment of costs is sought, which may, under Consol. Stat. U. C., ch. 24, sec. 19, be followed by execution, the service of the summons must, in general, be personal.

The Court may, under special circumstances, dispense with personal service.

Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that the defendant is keeping out of the way to evade service, and even in this case it is by no means clear that personal service will be dispensed with.

Service on the attorney on the record, and on the wife of the defendant, it not being shewn that the defendant was keeping out of

the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada, and gone to reside in the United States of America. — *The Queen v. Simpson*, 339.

[*See* ARBITRATION, 1, 7, 8, 9.]

Should follow judgment.] — See EJECTMENT, 4.

Amendment of.] — See JUDGMENT, 1, 4.

Spent writ.]—See FI. FA. LANDS.

Stay of—Effect as to priority of writs.]—See INSOLVENCY.

EVIDENCE.

See DISCOVERY.

FI. FA. LANDS.

*Spent writ—Feigned issue—Setting aside.]—*Fi. fa. lands has been renewed on the 25th of August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by plaintiff's attorney to the Sheriff, and the latter on the same day sent the usual advertisement thereof to the Canada Gazette and a local paper. On the 2nd September following, it appeared in a local paper, and in the Gazette on a subsequent day.

Held, that the writ was spent, and that the lands could not be legally sold under it. Owing to the difficulty of deciding whether the judgment had been paid or not, the learned Judge decided that the parties should proceed to the trial of a feigned issue on that ground.—*Reynolds v. Streeter*, 315.

FOREIGN CORPORATIONS.

*Service on—C. L. P. A. sec. 17.]—*The first part of sec. 17 of the Common Law Procedure Act, applies only to corporations whose chief place of business is within Upper Canada; the remainder to foreign corporations.

Where, therefore, a writ of summons against a foreign corporation was served in Upper Canada upon the president, but it was not shewn that he transacted any business of the company there, the service was held bad.—*Wilson v. The Detroit and Milwaukee Railway Company*, 37.

FOREIGN ENLISTMENT ACTS.

*Sufficiency of warrant.]—*A warrant of commitment reciting that F. M. was charged on the oath of J. W., "for that he, F. M., was this day charged with enlisting men for the United States army, offering them \$350 each as bounty," without charging any offence with certainty and without stating that the men enlisted were subjects of Her Majesty, and without shewing that J. W. was unauthorized by license of Her Majesty to enlist, was held bad.—In the matter of *Francis Martin*, 298.

GARNISHEE.

See ATTACHMENT OF DEBTS.

GROWING TIMBER.

Sale of — Lien for price.] — See REPLEVIN.

HABEAS CORPUS.

1. *Sufficiency of Materials for — Discretion of Judge.*]—Held, that the affidavit upon which an order for a writ of habeas corpus is moved should be entitled to one or other of the Superior Courts.

That as a general rule the affidavit should be made by the prisoner himself, or some reason, such as coercion, &c., shewn for his not making it.

That it is discretionary with the Judge to whom the application is made to receive an affidavit of a different kind.—In re William Ross, 301.

2. *Return to Writ.*] — It is sufficient to return to a writ of habeas corpus a copy of the warrant under which the prisoner is detained, and not the original.—Ib.

3. *Power of Judge in Chambers.*]—Quære, Can a Judge in Chambers rescind his order for a habeas corpus, or quash the writ itself, on the ground that it issued improvidently.

Quære, also. Has a Judge in Chambers power to call upon the prosecutor or magistrate to shew cause why a writ of habeas corpus should not issue instead of one ordering the issue of the writ.—Ib.

4. *Ad subjiendum — Vacation.*]—Held, that at Common Law the Judges of the Superior Courts of Common Law have power to direct the issue of writs of habeas corpus ad subjiendum in vacation, returnable either in term or vacation.—Re Hawkins, 239.

HAB. FAC. POSS.

See EJECTMENT.

IDEM SONANS.

See MISNOMER.

INFANTS.

See LACHES, 4.

INSOLVENCY.

Insolvent Act, 1865, ss. 3, 12, 13 —Stay of execution—Lien for costs —Sheriff's fees.]—Judgment creditors having executions in the Sheriff's hands, under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on performance of certain covenants therein mentioned. Upwards of thirty days afterwards the defendant made an assignment under the Insolvent Acts; the conditions of the agreement for extension of time having been up to that time performed.

Held, 1. That the writs were not in the Sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the Sheriff took priority.

2. That the seizing creditors had no lien for their costs under secs. 3, 12, 13, of the Act of 1865, the right of lien there given applying solely to the law of the Province of Quebec.

3. That the Sheriff had no lien or claim on the goods seized for payment of his fees. In re W. M. Ross, 394.

INSOLVENT DEBTOR.

1. *Application for discharge from ca. sa.—Seduction.*] — A defendant in custody under a ca. sa. issued against him for not answering satis-

factorily interrogatories on a judgment obtained in an action of seduction, held, a debtor, entitled to apply for his discharge under Consol. Stat. U. C., chaps. 24, 26.—*Boyd v. Bartram*, 28.

2. *Application for discharge — What entitles to.*] — The provisions of 5 W. IV., ch. 3, sec. 6, not having been re-enacted in the Consolidated Acts, the law has been changed, and the debtor is now entitled to his discharge if he gives the information called for by interrogatories or examination viva voce, and it appears that he is not worth \$20 exclusive of the articles exempted, unless his case is brought within the provisions of Consol. Stat. U. C., ch. 26, sec. 11.

Under the circumstances of this case, held not within any of the provisions in sec. 11 of Consol. Stat. U. C. ch. 26, and that the debtor must be discharged; but it was made a condition that he should assign to the plaintiff certain claims.—*Wallis v. Harper and Gibson*, 50.

3. *Examination of.*] — A plaintiff against whom a defendant has recovered a judgment for costs only, in either of the Superior Courts of Common Law or a County Court, is not liable to be examined or committed under sec. 41 of Consol. Stat. U. C., ch. 24.—*In re Hawkins*, 239.

4. *Order of committal by junior Judge.*]—Quære, must an order of committal made by a junior Judge of a County Court, under sec. 41 of Consol. Stat. U. C., ch. 24, on the face of it shew the death, illness, unavoidable absence or absence on leave of the senior Judge.

Semble, it need not; for the maxim omnia presumuntur recte esse acta will not be held to apply.—*Ib.*

INTERPLEADER.

1. *Proceeds of sale in Sheriff's hands.*]—An interpleader may be directed for the proceeds of a sale in the Sheriff's hands.—*Booth v. The Preston and Berlin R. W. Co.*, 90.

2. *Staying action of Sheriff on terms.*]—Under the circumstances of this case it was ordered that the claimant's action against the Sheriff should be stayed, and his claim against the execution plaintiff barred on terms, Sheriff to pay costs of claimant's action.—*Ib.*

3. *Garnishment.*] — Where proceedings are taken to garnish a debt, which is claimed by a third party as assignee, there is no power to direct an interpleader issue between such third person, and the judgment creditor, to try the validity of the alleged assignment.—*Kerr et al. v. Fullerton (Cornwall et al., garnishees)*, 19.

INTERROGATORIES.

Under the Common Law Procedure Act, sec. 190, the leave of the Court or a Judge is necessary to authorize interrogatories either with the declaration or pleas or at any other time. — *Bank of Upper Canada v. Ruttan*, 46.

JUDGE IN CHAMBERS.

Power with reference to writs of habeas corpus.] — See *HABEAS CORPUS*, 3, 4.

Ordering record to be brought in to have judgment entered.]—See RECORD.

Right to review decision of County Judge.]—See ARREST, 3.

JUDGMENT.

1. *Amendment.]—*Plaintiffs sued defendants, describing them as executors of one W., on their promise to pay a legacy left to the plaintiff by testator, in consideration of his forbearing to sue. Defendants pleaded only payment, and the plaintiffs obtained judgment on the 7th of July, 1859, which by mistake was entered against defendants as executors, to be levied of the goods of the testator in their hands, *et si non de bonis propriis*. A *fi. fa.* goods issued next day in accordance with this judgment, to which the Sheriff returned £29 12s. made of the goods of defendants, and that they had no more goods. In October following a *fi. fa.* residue issued against the lands of testator, and in December, 1860, a *ven. ex.*, under which, in February, 1861, the Sheriff sold all the interest of the defendants as executors in the lands of W. which was purchased by one of the plaintiffs, but had not been conveyed.

The plaintiffs in May, 1861, applied to amend the judgment, by striking out the direction to levy of the testator's goods, and to amend the writs also accordingly; and they produced a paper signed by defendants, in September, 1859, in which they recited that a *fi. fa.* had issued against their goods, which they could not satisfy, and agreed that the plaintiff might take execution against their lands for the balance, with interest at 12 per cent.

The Court, under these circumstances, amended the judgment and *fi. fa.* goods on payment of costs; and set aside the *fi. fa.* lands, leaving the plaintiffs to take out a new writ against defendants' lands.—*Purdie and wife v. Watson et al., executors*, 23.

2. *Right of subsequent creditors to move against.]—*A judgment obtained contrary to the Consol. Stat. U.C. ch. 26, sec. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment.—*McGee v. Baird and Cunningham*, 9.

3. A judgment will be set aside on the motion of a subsequent judgment creditor only when it had been procured by fraud, the process of the Court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain.—*Balfour v. Ellison et al., Executors*, 30.

4. *Judgment and execution — Amendment of — Right of other judgment creditors to object.]—*The plaintiff having declared against defendant as executrix, and obtained judgment by default, by mistake entered it and issued execution as against her in her own right, and on discovering the error obtained an order to amend the judgment roll and *fi. fa.* so as to correspond with the declaration. On motion to set aside this order, at the instance of other judgment creditors of defendant as executrix, *held*, any fraud or collusion between the plaintiff and defendant in the suit being denied, that the applicants had no right to prevent or interfere with such amendment, and

that the fact of their judgments being unknown to the Judge when he made the order was immaterial.—*Nicholls v. Nicholls, Executrix*, 201.

Delay in application to set aside.]—See LACHES, 1.

Bringing in record to have judgment entered.]—See RECORD.

Setting off judgments.]—See SETTING OFF JUDGMENTS.

Assignment of.]—See ATTACHMENT OF COSTS.

Presumption of release—Revivor.] See EJECTMENT, 6, 7, 8.

JUNIOR JUDGE.

Powers of.]—See INSOLVENT DEBTOR, 4.

JURISDICTION.

County Courts — Title to land.]—See COSTS, 2.

LACHES.

1. *Application to set aside judgment.*]—A summons was served on the 19th February, 1859, and final judgment signed for want of appearance on the 24th of December, 1860, and execution issued. Defendants on the 21st January, 1861, moved to set aside the judgment on the ground that it had been signed more than a year after the summons was returnable, and without giving a term's notice. *Held*, that the application was too late.—*McKenzie et al. v. McNaughton et al.* 35.

2. *Application to amend.*] — Defendant, being sued on a lease for not repairing, pleaded in effect

that the injury was caused by the plaintiff, and in Eastern Term, 1863, the plea was held bad on demurrer. In the following term he applied for leave to amend by pleading the same defence in an equitable form, in order to avoid a cross action for damages, which he swore he believed the plaintiff would be unable to satisfy. It appeared that the acts complained of by defendant were committed, if at all, about three years ago, but they were positively denied by the plaintiff and defendant had never sued for them. Under these circumstances the application was refused. — *Kelly v. Moulds*, 207.

3. *Cause from the Country.*] — *Held*, that an application on the part of an attorney resident in the country, made on the 1st of March, to set aside notice of trial served on the 24th of February, on his Toronto agent, as irregular, being made within eight days after such service is not too late.—*Anderson v. Culver et al.*, 306.

4. *Infancy — Notice of Trial—Irregularity.*]—The plaintiff in ejectment, through an infant sued in person. Defendant became aware of the infancy at the first trial of the cause, but the verdict having been set aside he took no objection until after the second trial when a verdict was given against him for non-appearance. He then moved to set aside the proceedings on this ground, and for want of proper notice of trial, the notice having been endorsed on the issue book: but defendants' attorney swore that he did not perceive it until too late to prepare for trial.

Held, that defendant was precluded by his delay, and the Court re-

fused to interfere.—*Ham v. Egan*, 16.

Delay in proceedings necessary to obtain new trial.—See NEW TRIAL.

Delay in application for security for costs.—See SECURITY FOR COSTS.

LANDLORD AND TENANT.

Lease with right to purchase—Holding over — Ejectment. — See EJECTMENT, 11.

LIEN.

For trees severed from freehold. — See REFLEVIN, 2.

MANDAMUS.

Peremptory mandamus — Teste — Return—Attachment for contempt. — No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ.

Such an attachment must be tested in term, on the same day as the rule on which it issues.

The rule *nisi* called upon the trustees of school section number twenty-seven in the township of Tyendinaga, in the County of Hastings, to shew cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B. and C., stating them to be trustees of said section, a rule absolute was granted, following it in form, and thereupon an attachment issued against A., B. and C. *Held*, bad, as not warranted by the rules.—*The Queen v. School Trustees of Tyendinaga*, 43.

MASTER AND SERVANT.

Action for negligently setting fire to plaintiff's barn.—See PLEADING, 1.

MISNOMER.

One of the defendants, Edmund M., correctly styled in the summons was by mistake named in the judgment roll and execution as Edward M. *Held*, amendable.—*McKenzie v. McNaughton, et al.*, 35.

MORTGAGE.

See CHATTEL MORTGAGE.

Sale under power — Taxation of Costs.—See COSTS, 9.

MUNICIPAL ELECTIONS.

See CONTESTED ELECTIONS.

NEW TRIAL.

1. *Delay in taking out rule—Application to rescind.*—In Michaelmas Term, on application by defendant for a new trial, the plaintiffs had leave to amend their declaration within a month, the rule to be then discharged. The time was accidentally allowed to expire without amendment, which the Clerk of the Crown refused then to allow, and defendant after the Spring Assizes took out and served the rule absolute for a new trial.

Held, that the omission of defendant to take out and serve the rule absolute before the Assizes formed no ground for rescinding it, for the plaintiffs might themselves have obtained and served it if they had desired to go to trial; but ow-

ing to defendant's delay, and the point being new, the rule to rescind was discharged without costs:—*Lyman et al., v. Snarr*, 86.

2. *On payment of costs — Delay in payment—Motion to rescind rule.*]

—A rule for a new trial on payment of costs was obtained by defendants in Hilary Term. On the 23rd of March the costs were taxed and an allocatur served on the agent of defendant's attorney, but the costs were not paid, and the plaintiff in consequence was thrown over the Assizes, which took place on the 23rd of April. On motion to rescind the rule, it appeared that defendant lived some distance from his attorney, who wrote to him three letters, none of which he received, though he attended the post twice a week, until the 21st of April. On that day he paid the costs of his attorney, who did not see the plaintiff's attorney till the 28th of May, and the latter then declined to receive them. The action was brought to try a question of boundary.

Under these circumstances the Court refused to rescind the rule, and gave the defendant a month to pay the costs taxed and the costs of this application.—*Van Every v. Drake*, 84.

NON PROS.

Penal action.—A judgment of *non pros.* regularly signed in an action by a common informer for a penalty will not be set aside.—*McClenaghan v. McLeod*, 13.

NONSUIT.

Costs.—Cause struck out at trial.]
—See COSTS, 3.

NOTICE OF TRIAL.

1. *Undertaking to take any notice.*—The plaintiffs obtained a judgment on a specially endorsed writ, which was set aside by Judge's order. Defendant's attorney then wrote to the plaintiff's attorney asking for a day or two to plead under the order, and adding, "I will take any notice of trial." The Assizes began on the 12th of October. The plaintiffs served their declaration too late to compel pleas before the 13th, when they were served, but they entered their record and waited until the 7th of November, when they gave notice of trial for the 12th.

Held, that the letter did not oblige defendants to accept such a notice; and the verdict was set aside.—*Provident Permanent Building, etc., Society v. McPherson*, 96.

2. *Notice of trial too late—Reference at Nisi Prius.—Time for moving.*—When notice of trial had been served too late, but the cause was entered, and referred by the Judge at *nisi prius* to arbitration, no verdict being taken: *Held*, that a motion to set aside the proceedings must be made within the first four days of the next term. — *Allen v. Boice*, 200.

Application so set aside—Delay.]
See LACHES, 2, 3.

Service by mail.—See SERVICE OF PAPERS, 2..

ORDERS.

See RULES AND ORDERS.

OVERHOLDING TENANT.

Lease with right of purchase — Ejectment.—See EJECTMENT, 11.

PAYMENT INTO COURT.

Percentage—fees.—No per centage can be claimed upon money paid into Court except under a plea.

Where money was paid in under a Judge's order to abide the result of another suit, *held*, that the only charge allowable to the Clerk was 20s., under the tariff of fees—*Carroll, Sheriff v. Potter*, 11.

PENAL ACTION.

See NON PROS.

PER CENTAGE.

See PAYMENT INTO COURT.

PLEADING.

See LACHES, 2—VARIANCE.

1. *Master and servant—Action for negligently setting fire to plaintiff's barn — Materiality — Effect of not guilty.*—The first count of a declaration for setting fire to the plaintiff's barn, &c., alleged that the plaintiff, *at the time when, etc.*, was possessed of a farm, &c., that the defendant Chapman was *at the said time*, possessed of the southerly portions of the lots of which the plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, &c., and that by reason of negligence and carelessness the fire spread to the plaintiff's land and burned his barn, &c.

The third count alleged possession of the plaintiff and Chapman, as in the first count, it then de-

scribed the defendant's premises as adjoining the plaintiff's premises, and then alleged that Gereau by the order, &c., of Chapman, he the said Gereau *being at the time* in the service and employ of Chapman, set fire to a brush heap, &c., and that the defendant did not use due care, &c., whereby, &c.

Held, That the allegation that Gereau was at the time when, &c., was a material allegation.

That the allegation of Gereau *being, &c.*, in the first count referred to the *time* stated, namely, at the time of the committing, &c., and was sufficiently certain.

That the allegation distinctly appeared in the first count, and was quite distinct from the wrongful act alleged.

That the allegation that Gereau was at the time when, &c., was not in issue under the plea of not guilty, and should, if intended to be disputed, have been specially traversed.—*Henderson v. Chapman and Gereau*, 311.

2. *C. L. P. Act, sec. 98—Plea of puis dar. con.—Necessity for, and after demurrer and other issues to be tried.*—To a fourth plea to the first and second counts of a declaration the plaintiffs demurred, upon which judgment was given for the plaintiffs on the demurrer. The plaintiffs also traversed the plea, on which issue was taken. Defendant subsequently pleaded *puis dar. con.* to same counts. On an application to set aside this latter plea:

Held, That under sec. 98 of C. L. P. Act, a copy of the affidavit filed with a plea of *puis dar. con.*, or the order dispensing with such affidavit, must be served with the plea.

That a plea of *puis. dar. con.* may be pleaded after demurrer filed, or even after judgment on the demurrer, so long as there are other issues remaining on the record for trial—certainly so, when the judgment did not relate to the remaining issue:

But that the plea of *puis. dar. con.* must be set aside, because the fourth plea (which was to the same counts) and the issue in fact joined upon it and the judgment against it could not be got rid of by, in effect substituting another plea for it, and thus amending or pleading double without leave. — *Gordon & McKay v. Robinson*, 366.

—*Declaration, after removal by certiorari, for different cause of action.*]—See CERTIORARI, 3.

PRACTICE.

Of what Court in England to be adopted.]—*Held*, that we are not to adopt as a rule the decisions of the Court of Queen's Bench in matters of practice, more than those of the Court of Exchequer or Common Pleas, but exercise our own judgment as to which is the best practice to adopt, and adopt that which will be most convenient and suitable for ourselves, whether it be the decision of one Court or the other. — *Hawkins v. Paterson*, 253.

PRISONER.

1. *Time to declare against a prisoner—Effect of not doing so.*]—*Held*, that under C. L. P. Act, sec. 32, coupled with rule 100 of 20 Vic. a plaintiff is bound to declare against a defendant in close custody within the term next after the arrest.

Held also, that the fact that defendant had, during the term, made application for his discharge from custody, which application was refused before the end of the term, was no sufficient excuse for not declaring during the term.

Held, also, that a defendant once supersedeable is always supersedeable.—*Glennie v. Ross*, 289.

2. *Proceedings against—Meaning of "prisoner."*] — Defendant having been at large on bail when the verdict was obtained against him, was rendered by his bail near the end of the ensuing term, and not having been charged in execution during that term, applied for his discharge. *Held*, that he was not a prisoner, within the meaning of the rules of Court, at the time of the trial, not having been in close custody, and the application was refused.—*Curry v. Turner*, 144.

PRODUCTION OF DOCUMENTS.

See DISCOVERY.

PROHIBITION.

See DIVISION COURTS.

PROMISSORY NOTE.

Action against maker and endorser—Common counts struck out.] — Where plaintiff, the holder of a promissory note made by one defendant and endorsed by the other, sued both defendants in one action, under Con. Stat. U. C. cap. 42, sec. 23, and at the same time declared against the defendants on the common counts for money paid and on

an account stated, the latter counts, on the application of defendants, were struck out of the declaration.—*Biggar v. Scott, et al.*, 268.

PUIS DARREIN CONTINUANCE.

See PLEADING, 2.

RECORD.

Compelling plaintiff to bring in record for entry of judgment—Judge in Chambers.—Held, that a defendant who conceives he has a right to costs against a plaintiff, in consequence of plaintiff having recovered in a Superior Court an amount within the jurisdiction of an Inferior Court is entitled to call upon plaintiff, either himself to proceed to the entry of judgment, or to bring in the record, in order that judgment may be entered by defendant.

Held, also, that a Judge in Chambers has power to entertain the application and make the order.—*Cross v. Waterhouse*, 287.

REEVE.

See CONTESTED ELECTIONS, 2.

REFERENCE TO COUNTY COURT.

When cause made a remanet.—Where a record had been entered for trial at an Assize and made a remanet, it was *held* that so long as the order for a *remanet* remained in force, the cause could not, under Statute 23 Vic. cap. 42, sec. 4, be

sent to the County Court for trial.—*Adams v. Grier*, 269.

RELEASE.

Presumption of — Ejectment — Revivor.—*See* EJECTMENT, 8.

REMANET.

See REFERENCE TO COUNTY COURT.

REPLEVIN.

1. *Revenue Laws.*] — A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside.—*Scott v. McRae*, 16.

2. *Sale of growing timber—Lien for price*—23 Vic. cap. 45, sec. 2—*Trover.*]—Where plaintiff, being the owner of timbered land, verbally agreed to sell growing timber to defendant and there was a dispute as to the price, it was held that the property in the trees passed as soon as severed from the freehold, but the plaintiff had a lien upon them for the price, and therefore that defendant without discharging the lien had no right to remove the timber.

Semble, trover may under such circumstances be maintained by the owner of the land against the vendor of the timber. — *McCarthy v. Oliver*, 297.

3. *Return to writ of, by Sheriff.*] —Return by Sheriff to a writ of replevin, that the property had not been since the delivery of the writ to him in the possession of defendant, or any person for him—Attachment as for an insufficient return

refused with costs—Remarks as to the propriety of such return, and the Sheriff's duty under the circumstances.—*Carveth v. Greenwood*, 175.

Certificate necessary to obtain full costs in.]—See COSTS, 5.

REVENUE LAWS.

See REPLEVIN.

REVISION OF TAXATION.

See COSTS, 9.

REVIVOR.

See ATTACHMENT OF DEBTS, 13
—EJECTMENT, 6, 7, 8—EXECUTION,
1.

RULES AND ORDERS.

1. *Unreversed order.*] — So long as a Judge's order stands unreversed by the Court, a Judge in Chambers will assume that neither party is dissatisfied with it.—*Hall v. Brown*, 293.

2. *Rule moved on affidavit filed in Chambers.*]—Where a rule nisi in full Court did not disclose the fact that it had been obtained on an affidavit previously used in Chambers to obtain a summons for the same purpose, and the leave of the Court to take such affidavit off the files was not shewn: *Held*, irregular, and the rule was discharged with costs.—*Small v. Eccles*, 189.

Service of summons to obtain order for payment of money and execution.]—See ARBITRATION, 1, 7, 8, 9
—EXECUTION, 2, 3.

Death of party after summons argued, but before order made.]—
See ATTACHMENT OF DEBTS, 5.

SEDUCTION.

See INSOLVENT DEBTOR, 1.

SECURITY FOR COSTS.

1. *Time for application.*]—An appearance was entered on 13th September, 1862, declaration filed on 29th of same month, order for security for costs obtained on 7th October, 1862, on the ground that plaintiff had left Canada, and order rescinded on 11th March, 1863, on the ground of his return. Plaintiff again left Canada in October, 1863. An application was again made in March, 1864, for security for costs.

Held, not to be too late there being nothing to shew when defendant first had notice of defendant leaving in October, 1863, or that defendant had taken any steps in the cause, between that date and the date of his application.—*Somers v. Carter*, 328.

2. In an action of ejectment commenced on 26th February, 1861: appearance entered on 18th March following, defendant, on 19th of same month demanded security for costs on the ground that the plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial, it was held that an application made by defendant for

security for costs, after service of the notice of trial was too late.—*Fogo v. Pypher et al.*, 309.

3. *Plaintiff within the jurisdiction, but about to go abroad.*]—*Held*, that if the plaintiff be actually a resident of the Province at the time of the application for security for costs, and intend so to remain until trial or judgment in the cause, security for costs ought not to be ordered.

Semble, if a resident in the Province were to declare his intention for leaving for abroad at once, and had sold off his property, and made other preparations for his immediate departure, with his intention of residing abroad, that upon these facts being shewn, the party might be called upon to give security, according to the general practice.—*Hawkins v. Paterson, et al.*, 253.

4. *Term's notice.*] — Application for security not such a proceeding as will obviate necessity of term's notice.—*Anderson v. Culver et al.*, 306.

SERVICE OF PAPERS.

1. *On attorney or agent—Leave of Judge—Waiver.*]—Defendant was served out of this Province in September, 1859, with an ordinary writ of summons, addressed to him as of the township of Sombra. The declaration was filed on the 4th March, 1860, and a copy served by putting it up in the office of the Deputy Clerk of the Crown at Belleville, and by leaving it at the last place of abode of the defendant there, and the issue book and notice of assessment were served in the same way. On ap-

plication to set aside the proceedings, the defendant, who was an attorney, swore that he knew nothing of any steps being taken after receiving the writ until the verdict had been obtained. The plaintiffs' attorney, in answer, swore that after service of the summons he had several conversations with the defendant, who requested him to make no more costs, but give him time to settle, in consequence of which he delayed serving the declaration personally, as he could otherwise have done.

Held, that the fact of defendant being an attorney could not make the service good, for it was not shewn that he was practising, nor that he had not a booked agent at Toronto, nor that copies had been put up in the Crown office here.

That it could not be upheld under our rule of Court No. 133, no leave of the Court or a Judge having been obtained.

That the request made by defendant for time could not be treated as a waiver of his right to a proper service; but in consequence of it the proceedings were set aside without costs.—*O'Neil et al. v. Everett*, 98.

2. *Service by mail.*] — Where it was agreed between the attorney of the parties to a cause (the one resident in Whitby and the other in Collingwood), that papers should be served by mail, it was *held* that the time of the service of notice of trial commenced to count from the time it was mailed by plaintiff's attorney, and not from the time of its receipt by the defendant's attorney.

Semble, where such a mode of service is agreed upon the paper mailed in the event of loss or mis-

carriage, is entirely at the risk of the attorney to whom sent.—*Robson v. Arbuthnot*, 313.

Unauthorized acceptance by attorney.—See ATTACHMENT OF DEBTS, 4.

Service of garnishee summons and order.—*Ib.*

Service of subpoena—Fees for.—See COSTS, 6.

On Foreign Corporation.—See FOREIGN CORPORATION.

SET OFF.

See ARBITRATION, 11.

Service of summons to obtain order for payment of money and execution.—See ARBITRATION, 1, 7, 8, 9—EXECUTION.

SETTING OFF JUDGMENTS.

1. *Application to stay proceedings till judgment obtained by defendants.*—Defendants, as attorneys, delayed to register a mortgage to B., their client, by which the security was defeated. They then obtained another mortgage from the same mortgagor to B., on different land, subject to two prior incumbrances, and B. authorized their proceeding to foreclose this mortgage, expressly without prejudice to his rights as against them. B. having died pending a suit against defendants for negligence, his administrators obtained a verdict in it and issued execution. Defendants then applied to stay proceedings until they could obtain judgment for the costs taxed in the foreclosure suit, in or-

der to set it off, B.'s estate being insolvent. In answer it was urged that the second mortgage and foreclosure (which turned out of no benefit), as well as the insolvency, resulted from defendant's negligence, and that the judgment against them was the only fund to which the plaintiffs had to look for the expenses of administration, &c., for which they were personally liable. The application was refused.—*Lynch et al., Administrator v. Wilson et al.*, 169.

2. Under the circumstances of this case the set-off of a judgment was refused.—*In re Smart v. Miller*, 385.

SHERIFF.

See ATTACHMENT OF DEBTS—INSOLVENCY—INTERPLEADER, 2 — REPLEVIN, 2.

SLANDER.

Affidavit to hold to bail in action of — Setting aside arrest.—See ARREST, 2.

STATUTES (CONSTRUCTION OF).

Con. Stat. U. C., ch. 22.—(C. L. P. Act).

Sec. 5.—See Writs, 3.

“ 12.—See Costs, 10.

“ 32.—See Prisoner, 1.

“ 98.—See Pleading, 2.

“ 277.—See Costs, 6.

“ 288.—See Attachment of Debts.

“ 328.—See Arbitration, 3.

- Ch. 24, sec. 19.—*See* Arbitration 1,
7, 8, 9, Execution, 2, 3.
sec. 25.—*See* Arrest, 4.
sec. 41.—*See* Insolvent Debtor.
Ch. 26, sec. 11. — *See* Insolvent
Debtor.
Ch. 26, sec. 17.—*See* Judgment 2.
Ch. 35, sec. 8.—*See* ATTORNEY, 2.
Ch. 35, sec. 30.—*See* ATTORNEY, 2.

STAYING PROCEEDINGS.

See EJECTMENT, 1. — SETTING OF
JUDGMENTS, 1.

SUBPOENA.

Service of—Fees for.—See COSTS,
6.

SUPERSEDEAS.

See PRISONER, 1.

SUMMONS.

See SERVICE OF PAPERS — WRITS.

TAXATION.

See ATTORNEY—COSTS.

TERM'S NOTICE.

See LACHES, 1.

Secrity for costs.]—Giving secur-
ity for costs is not such a proceed-
ing as will do away with the neces-
sity of giving a term's notice.—
Anderson v. Culver et al., 306.

TESTE.

See MANDAMUS—WRITS, 3.

TIMBER.

Sale of growing — Replevin.] —
See REPLEVIN.

TIME.

See COMPUTATION OF TIME —
LACHES — NOTICE OF TTRIAL — PRIS-
ONER—SECURITY FOR COSTS.

TROVER.

Sale of growing timber.—Lien for
price.]—See REPLEVIN, 2.

VACATION.

See HABEAS CORPUS, 4.

VARIANCE.

On removal by certiorari—Tres-
pass.]—If a plaintiff on the removal
of a plaint from in a Division Court
by certiorari, vary his cause of ac-
tion in his declaration, the declara-
tion may be set aside as irregular,
with costs.

Where plaintiff sued in the Divi-
sion Court for injuries done to a
filly by a bull, alleged to belong to
defendant, and afterwards declared
in the Superior Court for entry by
defendant on land of plaintiff with
the bull, and tearing up the earth
and soil, &c., the cause of action
was varied.—*Mason v. Morgan, 325.*

[*See* CERTIORARI, 3.]

Of writ from praecepe.]—See
WRITS, 2.

VENUE (CHANGE OF).

1. *Principles which guide the Court in applications for — Special grounds.]—*The plaintiff is *Dominus litis* and entitled to lay the venue where he pleases, subject to the rules of Court.

The Court will not deprive the plaintiff of the right to lay the venue where he pleases unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to be changed.

If it be made to appear that there will be a great waste of costs in a trial of a cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue, the Judge is at liberty to exercise his discretion in the matter, and to make the order if he see fit.

In this case the Judge was not satisfied that there would be a waste of costs by reason of a trial in the County where the venue was laid, and so on that ground he declined to change the venue.

The suggestion that the defendants could not obtain a fair and impartial trial in the County was not made out to his satisfaction, and on that ground, as well as others mentioned in the case, he refused to interfere.—*Moor v. Boyd et al.*, 374.

2. *Plaintiff's application—Fear of losing debt.]—*The plaintiff in a transitory action having his choice of venue at first, can only be allowed to change it on shewing good ground:

In this case which was an action on a note, with the venue laid in Oxford, and *non fecit* pleaded, the plaintiff swore that unless he could try the case at the Winter Assizes in Toronto he would be very likely to lose his debt, and that from conversations with defendant he believed the plea was put in for time only; no affidavits were filed in answer, *Held*, sufficient.—*Mercer v. Vogt et al.*, 94.

VERDICT.

*Verdict subject to reference—Second verdict taken—Irregularity.]—*Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863; *Held*, that the second verdict was irregular, while the first remained, and was set aside with costs.—*Kelly v. Henderson*, 198.

WAIVER.

Of objection to service by appearance.]—See ATTACHMENT OF DEBTS, 4.

WARRANT OF COMMITMENT.

*In default of sureties to keep the peace.]—*A commitment in default of sureties to keep the peace should show the date on which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear. — *In re Wm. Ross*, 301.

Sufficiency of, under Foreign Enlistment Acts.]—See FOREIGN ENLISTMENT ACTS.

WITNESS.

Fees to.]—See COSTS, 7, 8.

WORDS, (CONSTRUCTION OF).

"Costs in the Cause."—See COSTS, 1.

"PRISONER."—See PRISONER, 2.

"Recovery without trial."—See ARBITRATION—COSTS, 10.

"Special Circumstances." — See ATTORNEY, 1.

WRITS.

See EXECUTION — FI. FA. LANDS.
—HABEAS CORPUS—HAB. FAC. POSS.
—MANDAMUS.

1. *Writ issued in blank — How taken advantage of — Praecipe.*]—The practice of issuing writs of summons in blank by officers of the Court is not to be sanctioned approved.

Where a ground of objection to writ of summons is that it was issued in blank, the facts connected

with its issue must be clearly laid before the Court, for nothing will be intended in favour of such an objection. — *Grimshawe v. White et al.*, 320.

2. *Variance from praecipe.*]—The fact that a writ of summons in ejectment in some respects varies from the praecipe on which it was issued, is no ground for setting aside the writ, for the *praecipe* is no step or proceeding in the cause.—*Ib.*

3. *Con. Stat. U. C. cap. 22, s. 5—Teste—Amendment.*]—Held, That a writ of *ca. sa.* tested in the name of a retired Chief Justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office, should be tested in the name of his successor.

That a writ tested in the name of a retired Chief Justice is an irregularity only, but which may be amended upon payment of costs.—*Nelson v. Roy*, 226.

WRIT OF TRIAL.

See REFERENCE TO COUNTY COURT.

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